

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA  
WILLIAMSPORT DIVISION

THE PENNSYLVANIA STATE : CASE NO.  
UNIVERSITY :  
v. :  
VINTAGE BRAND, LLC, :  
SPORTSWEAR INC., d/b/a :  
PREP SPORTSWEAR, :  
CHAD HARTVIGSON, ERIK :  
HARTVIGSON, and :  
MICHELLE YOUNG : 4:21-CV-01091

TRANSCRIPT OF PROCEEDINGS  
Jury Trial  
VOLUME I

Held before the HONORABLE MATTHEW W. BRANN, November 12,  
2024 commencing at 10:20 a.m., Courtroom No. 1, Federal  
Building, Williamsport, Pennsylvania.

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Proceedings recorded by machine shorthand; transcript produced  
by computer-aided transcription.

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1 (Proceedings commenced at 10:20 a.m.)

2 THE COURT: The matter set for trial before this  
3 Court today is that of the Pennsylvania State University  
4 against Vintage Brand, LLC, Sportswear, Incorporated, doing  
5 business as Prep Sportswear and Chad Hartvigson. This matter  
6 is docketed before this Court at civil No. 4:21-CV-01091.

7 Ladies and gentlemen, as my Courtroom Deputy,  
8 Mrs. Rhinehart has indicated, I am Chief United States  
9 District Judge Matthew W. Brann. I am a federal trial judge.  
10 I was appointed to the bench by the President of the United  
11 States and confirmed to this position by the United States  
12 Senate under Article III of the United States Constitution to  
13 serve during a term of good behavior, which has been  
14 interpreted to mean for life.

15 The Court that I preside over is the United States  
16 District Court for the Middle District of Pennsylvania. This  
17 federal trial court consists of 33 of the 67 counties of  
18 Pennsylvania and it is divided into three venire, the Scranton  
19 division, the Harrisburg division, and the division here in  
20 Williamsport.

21 Let me begin by thanking you for your presence here  
22 today and your willingness to serve as jurors in this case.  
23 Trial by jury are rights secured by the Seventh Amendment of  
24 the Constitution as the cornerstone of our judicial system and  
25 it ensures that all citizens receive a fair trial by a jury of

1 their peers.

2 As has often been observed, service on a jury is  
3 one of the highest civic duties in this nation, second only to  
4 service in the country's armed forces. The Virginia  
5 Declaration of Rights, a document that was drafted in 1776 to  
6 proclaim the inherent rights of all men said and would later  
7 influence several of this country's founding documents,  
8 affirmed that the jury trial is preferable to any other and  
9 ought to be held sacred. Your service as prospective jurors  
10 makes this system possible. I thank each of you very much for  
11 your fulfillment of this fundamental civic duty.

12 At this time, each of you is a member of the  
13 venire, meaning the pool which we will ultimately choose eight  
14 people to serve, and only if you are selected from this pool  
15 of fellow veniremen to serve on the jury this morning will you  
16 technically become a juror. In that process, selecting the  
17 eight from the veniremen is known as voir dire. We will turn  
18 to that portion of the proceedings at this time.

19 I will now conduct what is the voir dire, which  
20 is a preliminary examination by the Court of all prospective  
21 jurors. Voir dire is a French term, whose rough translation  
22 to English means quote, To say what is true, end quote. As  
23 the translation implies, your honesty and forthrightness is an  
24 absolute requirement throughout the entire voir dire process  
25 in order to ensure that this trial will be seen to completion

1 in a lawful and in a legitimate manner, free from any undue  
2 influence or impropriety. The purpose of voir dire is to  
3 enable both the Court and the attorneys for the parties to  
4 determine whether any of you should be excused for cause,  
5 meaning that there is some legal reason, such as prior  
6 knowledge of the case, familiarity with those involved, or  
7 strong feelings about the subject matter which will not allow  
8 to you serve as jurors in this case. Voir dire also allows  
9 the attorneys for the parties to exercise their individual  
10 judgment with respect to preemptory challenges, that is  
11 challenges for which no reason need be given.

12 The goal of this process is to obtain a jury that  
13 can try the case objectively, based solely on the evidence  
14 presented and without influence or bias of any kind.

15 The questions posed to you during this process are  
16 not intended to embarrass you, but instead to give the Court  
17 and the parties the information necessary to choose a fair and  
18 an impartial jury. To protect the integrity of this important  
19 process, I ask each of you to listen carefully to all  
20 questions and answer each one truthfully and completely.

21 The voir dire process will begin by each of you  
22 reading your biography as it is listed on the form that you  
23 have. I will then ask some questions of you as a group, and  
24 these questions will deal with your familiarity with the  
25 parties, the attorneys, and the witnesses, and your views on

1 issues related to the subject matter of this case. If you  
2 believe that an answer to a question may raise private or  
3 potentially embarrassing matters, please raise your hand and  
4 simply ask to speak to me here at the bench.

5 (At this time the veniremen were questioned, and  
6 the jury was impaneled.)

7 (11:57 a.m.)

8 THE COURT: All right. We're on the record now in  
9 this matter. The parties, through Counsel, have exercised  
10 their preemptory challenges. I would like the following  
11 veniremen to please stand. No. 1, you are Juror No. 1; No. 3,  
12 you are Juror No. 2; No. 7, you are Juror No. 3; No. 8, you  
13 are Juror No. 4; No. 12, you are Juror No. 5; No. 14, you are  
14 Juror No. 6; No. 15, you are Juror No. 7; No. 18, you are  
15 Juror No. 8. Yeah. 17, is Juror No. 8. This is the jury  
16 that's selected in this case. The rest of you now are  
17 excused.

18 Again, if you've left any personal items in the  
19 jury assembly room on the second floor, the Court Security  
20 Officers will show you out. You can retire there. Take these  
21 personal items with you. If you don't, you are directed to  
22 leave now with the thanks of the Court. I realize many of you  
23 have driven some distance to be here. As I said to those  
24 individuals who were excused for charge, this is Federal  
25 Court, not County Court. So some of you have driven two or

1 two-and-a-half hours to come here. Is there anyone here from  
2 Emporium? Usually someone from Cameron County. Somebody from  
3 Shinglehouse? Ulysses? Coudersport? Yes. I know where you  
4 are. I've driven to all these places. It's not next door,  
5 is, sir? No, it is not. So again, thank you very much for  
6 your service here today. You're excused with the thanks of  
7 the Court. You may depart.

8 Those of who you have been selected as the jurors,  
9 please remain where you are for the moment.

10 (At 11:59 a.m., the veniremen were excused.)

11 THE COURT: Counsel, be seated. Thank you.

12 Mrs. Rhinehart, swear in the jury, please.

13 (At this time the jury was sworn.)

14 THE COURT: Members of the jury, now that you have  
15 been sworn, I'm going to give you some preliminary  
16 instructions that should serve as guidance throughout this  
17 trial. Trial will begin this afternoon and will go on until  
18 probably Friday, November 22nd, 2000 24, at the latest. As I  
19 stated earlier, we will attempt to begin promptly at 9:30 a.m.  
20 each morning. We will end at approximately 5: 30 p.m. each  
21 day. We will try to break for lunch at approximately 12 to  
22 12: 30 each day. You'll be given approximately one hour for  
23 lunch. I will also endeavor to take routine breaks throughout  
24 the day to give you a chance to use the restrooms and to  
25 stretch your legs. If, however, you absolutely require a

1 break at another time, please let one of my staff know.

2 Now a few words about your conduct as jurors.

3 First, I instruct you that during the trial and  
4 until the time you retire to deliberate, you are not -- you  
5 are not to discuss this case with anyone, not even amongst  
6 yourselves. I know that many of you use cell phones, smart  
7 phones like Sam sung gal. I and IPHones and other portable  
8 electronic devices, lap tops, net books, and other computers,  
9 both portable and fixed, and other tools of technology and  
10 access the Internet and to communicate with others. You must  
11 not talk with anyone good this case or use these tools to  
12 communicate electronically with anyone about the case. This  
13 includes your family and friends. You may not communicate  
14 with anyone about this case on your cell phone, through  
15 e-mail, iPhone, text message or on twitter, through any blog  
16 or website, through any Internet chatroom or by any other way  
17 of social networking websites, including, but not limited to  
18 twitter, now known as X. Facebook, LinkedIn, Instagram,  
19 123457 chat, TikTok or YouTube. This means you should not  
20 talk about the case with anyone and you should not communicate  
21 with anyone about this case in any manner, such as by e-mail  
22 or text message.

23 It is very important that us do not discuss the  
24 case amongst yourselves until the end of the trial when you  
25 retire to the jury room to deliberate. You need to allow each



~~ROUGH DRAFT~~

1 juror the opportunity to keep an open mind throughout the  
2 entire trial. During the trial you may talk with your fellow  
3 jurors about anything else of a personal nature or comment  
4 interest but not about the trial. And also, you may tell your  
5 family and friends that you have been selected to be a juror  
6 in Federal Court, how long the jury -- excuse me, how long the  
7 trial is expected to last, but that I have instructed you not  
8 at a talk any more about the case and they should not talk to  
9 you about it either.

10 The attorneys, parties, and witnesses are also not  
11 permitted to talk to you about the case. So if any attorney,  
12 party, or witness does not speak to you when you pass in the  
13 hall, ride in the elevator or like, remember it is not because  
14 they are being rude. It is simply because they are not  
15 supposed to talk or visit with you either. This is why it's  
16 important that you wear your juror tags. It shows that you  
17 are someone who is not to be approached in any way. If anyone  
18 should try to talk to you about the case, including a fellow  
19 juror, bring it to my attention immediately by telling my  
20 courtroom deputy, Mrs. Rhinehart.

21 Second, do not read or listen to any anything  
22 related to this case that is not admitted in to evidence. By  
23 way of example, if there is a newspaper article or radio or  
24 television report relating to this case, do not read the  
25 article or watch or listen to the report.

1           In addition, do not try to do any independent  
2 research or investigation on your own related to this case,  
3 the matters in this case, or the individuals involved in this  
4 case. This means, by way of example, that you must not visit  
5 the scene, conduct experiments, consult reference works or  
6 dictionaries or search the Internet, websites or blogs for any  
7 additional information or use a computer, cellular phone, or  
8 other electronic devisor tool of technology or any other  
9 method to obtain information about this case, this type of  
10 case, the parties in this case, or anyone involved in this  
11 case. You must decide this case based only on the evidence  
12 presented in this courtroom and my instructions about the law.  
13 It would be improper for you to try to supplement that  
14 information on your own.

15           Do not reach any conclusion in this case until all  
16 of the evidence is in. Keep an open mind. Do not make up  
17 your mind about the verdict until you have heard all of the  
18 evidence and I have given you final instructions about the law  
19 at the end of the trial and you have discussed this case with  
20 your fellow jurors during your deliberations.

21           You should also not concern yourself with -- strike  
22 that. Finally, you will be allowed to take notes during this  
23 trial. My Courtroom Deputy, Mrs. Rhinehart will arrange for  
24 pens and paper, and while you are permitted to take notes, you  
25 are not required to do so. How many notes you take, if any,

1 is entirely up to you. If you do not choose to take notes, --  
2 if you do choose to take notes, keep the following points in  
3 mind.

4 First, do not allow note taking to distract you  
5 from your task as jurors. You must listen carefully to all of  
6 the testimony and decide whether and how much to believe each  
7 witness. This will require you to watch the appearance and  
8 the behavior of the witness while he or she is testifying. It  
9 may be difficult to take detailed notes and pay attention to  
10 what the witnesses are saying at the same time. Second, be  
11 brief. Do not try to write down everything that is said and  
12 do not try to summarize all of the evidence. Your notes are  
13 not a transcript. Make sure that your note taking does not  
14 interfere with your listening to and understanding and  
15 considering all of the evidence.

16 Third, remember that your notes are not evidence.  
17 They're merely a way to refresh your memory of the evidence.  
18 You should rely on your memory in reaching a decision in this  
19 case. Do not give more or less weight to the views of a  
20 fellow juror just because that juror did or did not take  
21 notes. Finally, if you do take notes, keep them to yourself  
22 until the end of the trial when you and your fellow jurors go  
23 to the jury room to deliberate. Be sure to take your notes  
24 each time you leave the courtroom. Please leave them in the  
25 jury room when you leave at night. After the conclusion of

1 the case, the Court officer will collect and destroy them to  
2 protect the secrecy of your deliberations.

3 Now a few words about your job as jurors and my job  
4 as the judge.

5 You have two main duties as jurors. Your first  
6 duty is to decide what the facts are based on the evidence.  
7 You and you alone are the judges of the facts. You will have  
8 to decide what happened. I play no role in judging the facts.  
9 Your second duty will be to apply the facts to the law that I  
10 will give to you. My role is to be the judge of the law. I  
11 can make whatever legal decisions have to be made during the  
12 course of the trial and at the end of the trial, I will  
13 explain to you the law which you must apply in reaching your  
14 decision in this case. You must follow the law, regard  
15 whether you agree with it or not. However, you should not  
16 take anything I may do or say during the trial as indicating  
17 what I think of the evidence or what your verdict should be.

18 Let me talk to you about evidence and I'll define  
19 it for. You must make your decision in this case based only  
20 on the evidence that you see and hear in court. Do not let  
21 rumors, suspicions or anything else that you may have seen or  
22 heard outside of court influence your decision in any way.  
23 The evidence upon which you may base your decision includes  
24 only the following: One, the testimony of the witnesses, that  
25 is what the witnesses say when they are testifying under oath.

1 Two, the documents and other things admitted as exhibits.  
2 Three, any facts to which the parties agree, and four, any  
3 facts that are judicially noticed, that is to say facts that I  
4 say you must accept as true. You should base your decision  
5 only on such evidence.

6 Certain things are not evidence and must not be  
7 considered. Statements, arguments, and questions by lawyers  
8 are not evidence. Objections by lawyers are also not  
9 evidence. There are rules that control what can be received  
10 into evidence and lawyers have an obligation to make an  
11 objection when they believe a question or an exhibit is not  
12 permitted by those rules. However, the objection is simply a  
13 request that I make a decision on a particular rule of  
14 evidence. You should not be influenced by the fact that an  
15 objection was made or by my ruling on it. If an objection is  
16 sustained, simply ignore the question. Do not speculate about  
17 what a witness might have said or what an exhibit might have  
18 shown. If an objection is overruled, treat the answer or the  
19 exhibit like any other. I may also instruct you that some  
20 item of evidence should be considered only for a limited  
21 purpose and you must follow that instruction. Also, certain  
22 evidence may be excluded or struck from the record, and I will  
23 instruct you to disregard this evidence and you must not  
24 consider any evidence or testimony that is struck or excluded.

25 At times during the trial, it may be necessary for

1 me to talk with the attorneys here at the bench. This is  
2 called a sidebar or a bench conference. During a sidebar, you  
3 will hear a white noise play over the jury box. You should  
4 not be able to hear the discussion here at the bench. If you  
5 are able to hear any of the side bars, please let my Courtroom  
6 Deputy, Mrs. Rhinehart know. The purpose of these conferences  
7 is not to keep important information from you. But rather to  
8 allow me to discuss with the attorneys any objections to  
9 evidence and to be sure that the evidence is presented to you  
10 correctly under the rules.

11 Sometimes a lawyer may request a sidebar and I may  
12 not always grant that attorney's request. Do not consider my  
13 granting or denying a request for a conference as suggesting  
14 my opinion of the case or what your verdict should be.

15 And finally, anything you may see or hear about  
16 this case outside of the courtroom is not evidence and must  
17 not be disregarded. You must decide this case based only on  
18 the evidence printed here in court, as I've noted.

19 Let me talk to you now about direct and  
20 circumstantial evidence. You'll be presented with two types  
21 of evidence in this trial, direct evidence and circumstantial  
22 or indirect evidence. Direct evidence is evidence which if  
23 believed directly proves a fact. For example, a witness may  
24 be testify that he saw it raining outside. Circumstantial  
25 evidence is evidence which if believed indirectly proves a

1 fact. By way of example, if someone walked into the courtroom  
2 wearing a wet rain coat and carrying a wet umbrella, that  
3 would be circumstantial or indirect evidence from which you  
4 could reasonably conclude that it was raining. You should  
5 consider all of the evidence presented in this case, both  
6 direct and circumstantial. The law makes no distinction  
7 between the weight that you should give to either type.

8 In weighing the evidence, you should use your  
9 common sense. Consider it in light of your every day  
10 experience with people and events and give it whatever weight  
11 you believe it deserves. If your experience tells that you  
12 certain evidence reasonably leads to a conclusion, you are  
13 free to reach that conclusion.

14 It will up to you to decide what testimony you  
15 believe and testimony you do not believe. You are the sole  
16 judges of the credibility of the witnesses. The credibility  
17 means whether a witness is worthy of belief. You may believe  
18 everything a witness says, only part of it, or none of it. In  
19 deciding what to believe you may consider a number of factors,  
20 including the following: One, the opportunity and ability of  
21 the witness to see, or hear, or know the things the witness  
22 testifies to. Two, the quality of the witness's understanding  
23 and memory. Three, the witness's manner while testifying.  
24 Four, whether the witness has an interest in the outcome of  
25 the case or any motive, bias, or prejudice. Five, whether the

1 witness contradicted -- excuse me. Whether the witness is  
2 contradicted by anything the witness said or wrote before  
3 trial or by other evidence. Six, how reasonable the witness's  
4 testimony is when considered in light of other evidence that  
5 you believe, and seven, any other factors that bear on  
6 believability.

7 This is a civil case, as I have noted. The  
8 Plaintiff, the party who brought this lawsuit is the  
9 Pennsylvania state university. The Defendants are the parties  
10 against whom this lawsuit are filed is Vintage Brand LLC,  
11 Sportswear incorporated and Chad Hartvigson. In this case,  
12 the Plaintiff must prove its claims by standard called  
13 preponderance of the evidence. This means that the  
14 Pennsylvania state university has to prove to you that what it  
15 claims is more likely so than not so. To put it differently,  
16 if you were to put the evidence favorable to the Plaintiff,  
17 Penn State on one side of the scale and the evidence favorable  
18 to the Defendant, Vintage Brand on the opposite side of the  
19 scale, the Plaintiff would have to tip somewhat on its side.  
20 If Penn State fails to meet this burden, your verdict must be  
21 then for the Defendants. You may have heard of the phrase  
22 proof beyond a reasonable doubt, that is a stricter standard  
23 of proof that applies only in criminal cases. It does not  
24 apply in civil cases such as this one. You should put  
25 anything you may have heard about the reasonable doubt



1 standard out of your mind and apply online the preponderance  
2 of the evidence standard which I have just explained to you.

3 Shortly after lunch, we will begin the trial.

4 First, each side may make an opening statement. What is said  
5 in the opening statement again is not evidence but is simply  
6 an outline to help you understand what each party expects the  
7 evidence to show. After the attorneys have made their opening  
8 statements, each party is given the opportunity to present its  
9 evidence. The Plaintiffs' Counsel will present witnesses and  
10 evidence first, because the Plaintiff has the burden of proof,  
11 and the attorneys for the Defendants will have the opportunity  
12 to cross-examine those witnesses. Following the Plaintiff's  
13 case, the Defendants' attorney may present witnesses and  
14 evidence, and the Plaintiffs' Counsel will have the chance to  
15 cross-examine these witnesses.

16 After you will of the evidence has been presented,  
17 the attorneys will present to you closing arguments that will  
18 summarize and interpret the evidence. And as about -- excuse  
19 necessity. As with opening statements, closing arguments are  
20 not themselves evidence. After you've heard closing  
21 arguments, I will give you final instructions concerning the  
22 law that you must apply to this case. And finally, after my  
23 instructions on the law, you will apply to consider your  
24 verdict. Your deliberations are secret. You will not be  
25 required to explain your verdict to anyone. You must reach a

1 unanimous verdict, which means that each of you must agree to  
2 it. Remember to keep an open mind during this trial. Do not  
3 make up your mind about any of the questions in this case  
4 until you have heard each piece of evidence, and all of the  
5 law, which you must apply. In other words, do not come to a  
6 decision until the end of the trial at which point you will  
7 begin your deliberations.

8 All right, well, we are right at the noon hour, a  
9 perfect place, I think, to end for the moment. And so I'm  
10 going to stand -- have you stand in recess for about an hour  
11 for lunch.

12 I am not a shill for Wegman's grocery store. But,  
13 you will note that there is a Wegman's grocery store here in  
14 town directly across third street. I would commend their food  
15 court to you. Yes, I know full well that it's over priced.  
16 I eat there regularly. That's not lost on me. But you can  
17 get a reasonable variety of things to eat, and a number of the  
18 restaurants in town are open, starting today, on Tuesday.  
19 They will not be open on Monday, typically. You're welcome to  
20 explore that. But again, the food court is an easy and for  
21 the most part, fairly economical place to eat. We'll stand in  
22 recess for an hour, until about 1: 15 p.m. I would like you  
23 back in the building, may be 10 minutes before that, 5 minutes  
24 before that. You're going to report to the jury assembly room  
25 where you were first thing this morning on the second floor.

1 The Court security officer will show you up. There will be  
2 someone from the staff will be waiting there. And we'll try  
3 to get under here another about 1: 15. So report to the jury  
4 assembly room on the second floor. Mrs. Rhinehart, Mrs.  
5 Reynolds or someone else from the staff will bring up to the  
6 jury room. Mrs. Rhinehart is going to show you the jury room  
7 now, and we'll stand in resets at this time. Please don't  
8 discuss the case, I don't believe there's anything to discuss.  
9 Find some other topic to talk B. And we'll you in about an  
10 hour. Escort the jury out, please.

11 (At 12:18 p.m., the jury left the courtroom for  
12 their lunch recess. )  
13

14 THE COURT: Be seated.

15 All right. We're back on the record now outside  
16 the presence of the jury.

17 I believe there were some issues, Counsel, that you  
18 wanted to discuss with me that principally relate to the  
19 charge.

20 Par so I'm going to make these rulings. I've  
21 looked over everything that you've submitted the last couple  
22 of days in terms of papers. I don't think I need any  
23 additional argument on this. I heard a little bit of argument  
24 this morning. Again, I've already started to work on the jury  
25 charge. That will, of course, be modified as you'd expect

1 during the course of the trial based on the evidence and the  
2 testimony presented. But there seem to be four issues that  
3 have a come up as to these instructions and let's discuss  
4 those and give you some orientation of my thinking on these  
5 issues at this time.

6 First, there appears to be a dispute over Vintage  
7 Brand's proposed nominative fair use instruction.  
8 Specifically, whether Vintage Brand may either present such a  
9 defense.

10 Penn State university asserts that the only fair  
11 use defense asserted in the Defendants' answers was a classic  
12 fair use defense. And I agree that it appears that the ninth  
13 affirmative defense is a classic fair use offense. Am I  
14 missing something? And if not, why Vintage Brand, should I  
15 not then conclude, Mr. Fetters, that you have waived the  
16 affirmative defense of nominal fair use? After all, this  
17 circuit, the United States Court of Appeals for the thirds  
18 circuit, has repeatedly stated that quote, failure to raise an  
19 affirmative defense by responsive pleading or by appropriate  
20 motion generally results in the waiver of that defense, end  
21 quote, and I am citing from, as you would expect to knows,  
22 Elliott, E. L. L. I. O. T. T. And Frantz, F. C. A.  
23 N. T. Z. Incorporated against Ingersol Rand company, found  
24 at 4 57, fed prosecuted, 3 12, specifically at page 32 1, a  
25 decision of our Court of Appeals from 2006.

1 MR. FETTERS: Your Honor, if I may defer to my  
2 colleague, Mr. McKenna?

3 MR. MCKENNA: Thank you, Your Honor. So I think  
4 the starting point here is that the Plaintiffs claim -- the  
5 nature of Plaintiffs' claim and specifically what is charged  
6 to be the I imagine infringement has been a moving target  
7 throughout this entire case. So it still remains unclear,  
8 actually which images on any of the shirts Penn State accuses  
9 of being infringing. The emphasis on the website was a much  
10 later development in the case. As Your Honor remembers on  
11 summary judgment, that question arose. You asked for  
12 supplemental briefing on the question because it was clearly  
13 being argued at that time. So Penn State's been on notice or  
14 quite a long time that nominative fair use as an argument that  
15 advantage was making with respect to specifically the website  
16 uses. Early in the argument, Penn State was making, it was  
17 pretty advertise clear that they accused I imagine  
18 infringement was referring specifically to the -- to products,  
19 not to the uses on the website. Uses on the website were just  
20 the context in which those things were being sold. Later, in  
21 their more recent things, they have now started to make it  
22 clear that they apparently also allegation that the uses on  
23 the website are separately infringing and of course our  
24 argument has always been, was on summary just a minute, was on  
25 the supplemental briefing that if the -- if the products

1 themselves are legal to sell, then it is legitimate for  
2 Vintage Brand to sell them on the website and to refer to them  
3 by name, which is with a the nominal fair use doctrine has  
4 been so I think the doctrine has been in the case for quite a  
5 long time. They've been on notice of it insofar as their  
6 claim refers to the website text in particular, which again,  
7 has been a moving target, I think it's been pretty clear that  
8 nominative fair use has been Vintage Brand's defense to that.

9 THE COURT: Who is going to speak for Penn State?  
10 Ms. Wheatley?

11 MS. WHEATLEY: I will, Your Honor.

12 THE COURT: Go ahead.

13 MS. WHEATLEY: The Defendants' infringement on the  
14 website was alleged in Penn State's complaint. So Defendants  
15 had the opportunity at that point to assert a Nominative fair  
16 use in their defense. As Your Honor noted, they asserted a  
17 classic fair use defense. They did not assert Nominative fair  
18 use. This has been clear from the beginning. The website was  
19 pictured in the complaint. We discussed it in its  
20 advertising. We separated out both the goods and the way they  
21 called it a Penn State Nittany Lion's store. In raising it in  
22 summary judgment does not resolve the deficiency of not  
23 raising it in the pleading. After that, discovery was closed.  
24 The opportunity to depose witnesses on this issue was -- had  
25 been completed.

1 THE COURT: Okay.

2 I understand. I'll take it under advisement.

3 You'll have a read ruling in due course.

4 So second, as you all well remember, I think there  
5 was a dispute in the motions In Limine about whether Vintage  
6 Brand can present a defense related to anti-trust law. I held  
7 that the Defendants may present such a defense. I was  
8 initially going to ask Counsel for Vintage Brand why no  
9 instructions were submitted in relation to that defense, but,  
10 in Penn State's filings on Friday evening and again on  
11 Saturday afternoon, they stated that Vintage Brand does not  
12 intend to pursue such a defense. Of course my decision on the  
13 motion In Limine permitting evidence of anti-trust concerns  
14 was premised entirely on the viability of that defense. So  
15 absence the defense, it seems to me that evidence is now  
16 irrelevant in this case. So why should I not prohibit the  
17 introduction of evidence related to the anti-trust issues?  
18 Who is going to speak to that for Vintage Brand. Mr. McKenna?  
19 Mr. Feters?

20 MR. FETERS: Your Honor, we think it's fairly  
21 assumed within the topic of anesthetic functionality, meaning  
22 that if these designs and logos on Vintage Brand's products  
23 are not functioning to indicate to consumers who is  
24 responsible for the quantity's products, then the alternative  
25 is that Penn State is asserting these claims to control the

1 market for any images that cause the consumers simply to think  
2 and invoke thoughts of the university. And so while we have  
3 no intention of explicitly making arguments, introducing  
4 evidence of conspiracy to restraint trade, things like that,  
5 we think that it should be fairly allowed that we make  
6 arguments to -- similar to what I just expressed, that Penn  
7 State is bringing this claim not because consumers are  
8 confused as to the source of Vintage Brand's products, but  
9 because they want to control the market of any imagery or any  
10 products that simply evoke thoughts of the University, which  
11 is the per se model that has been discussed it in many your  
12 court's orders.

13 THE COURT: Who is going to speak for Penn State.  
14 Mr. Finkelson, go ahead.

15 MR. FINKELSON: I will, Your Honor. Dave  
16 Finkelson. Control the market is the language of anti-trust.  
17 Your Honor allowed them to proceed with an anti-trust defense  
18 in the Motion In Limine ruling. They have communicated to us  
19 and we had communicated frankly prior to that ruling that they  
20 were no longer asserting it as a defense. They reaffirmed  
21 that after the fact of Your Honor's ruling. They do not have  
22 an anti-trust defense. Evidence about controlling the market  
23 or anti-competitive behaviors or suggestions is irrelevant  
24 under rule 40 2, highly prejudicial under rule 40 3, and under  
25 those and every other rule of evidence have zero relationship



1 to aesthetic functionality under any articulation, whether the  
2 Defendants's articulation or our articulation.

3 So we think that evidence is highly inflammatory.  
4 The Defendants can tell their story without any nod to  
5 anti-competitiveness, any nod to monopolization, any nod to  
6 controlling the market, and we would ask that any such  
7 evidence and argument be excluded.

8 THE COURT: Good. I'll take that under advisement,  
9 as well.

10 Third, there appears to be a dispute about  
11 instructions for contributory infringement. Penn State  
12 objects to any such instruction because it asserts its claims  
13 against Sportswear are for direct infringement, not  
14 contributory infringement. Starting with Defense Counsel, do  
15 you care to speak, perhaps, to that issue, and, in particular,  
16 Penn State's assertion that contributory liability is not an  
17 issue in this case. Does Vintage Brand agree, in light of  
18 that statement, that a contributory liability instruction is  
19 not appropriate?

20 MR. HARMS: Yes, Your Honor. Penn State hasn't  
21 pleaded facts supporting direct infringement against  
22 Sportswear. The only reason Sportswear is part of this  
23 lawsuit is because it contributed to the alleged infringement.  
24 The only theory that makes sense under the paradigm pled in  
25 this case, and Penn State's upper pleading, is a contributory

1 infringement allegation is a liability for contributory  
2 infringement.

3           So per the pleadings, we don't believe that there's  
4 a direct claim against Sportswear for infringement, which is  
5 why we believe it to be appropriate to instruct the jury in  
6 that regard.

7           MS. WHEATLEY: Your Honor, contributory  
8 infringement is when the infringement contributes, say, by --  
9 to providing services for the goods, but does not directly  
10 affix the mark to the products or shift the products to  
11 consumers. Here, Sportswear is the party that actually  
12 affixes the infringing marks to the products. They  
13 manufacture the products. The manufacturer of infringing  
14 products is always directly liable. They are also the  
15 distributor. They actually ship the products to the  
16 consumers, while Vintage Brand is the seller. All three of  
17 those are well-recognized bases for direct liability.

18           THE COURT: All right. Good. I'll take that under  
19 advisement, as well.

20           And fourth, Penn State is proposing an instruction  
21 regarding licenses, and licensees to which Vintage Brand  
22 objects. So I assume the only licensee at issue here is CLC,  
23 but perhaps I'm wrong. So is there a dispute here about what  
24 the licensor or licensee relationship has, in some way,  
25 corrupted or destroyed Penn State's trademark rights here such

1 that anything beyond a basic instruction regarding licensor or  
2 licensee relationship is required?

3 MR. MCKENNA: Your Honor, I think the objection is  
4 essentially that the mere reference to trademark rights  
5 arising out of licensing grossly understates the actual legal  
6 rules about the circumstances under which licensors are able  
7 to establish trademark rights, and so I think our request is  
8 if there's going to be an instruction along those lines, then  
9 it needs to actually track the law and it needs to actually  
10 the jury to make of findings about quality control and actual  
11 quality control by Penn State, and not just contractual  
12 references to it.

13 MS. WHEATLEY: Your Honor, Defendants have taken  
14 the position that the only trademark source of a product is  
15 the manufacturer. That is one of the things they have argued  
16 in the jury instructions they have proposed and to limit  
17 source to that. The Lanham Act expressly recognizes  
18 licensing. There is a section of the Lanham Act that goes  
19 precisely to that point that the licensor steps into the shoes  
20 of the licensee, and that the licensee's use and the rights  
21 therefrom in your to the benefit of the licensor. In other  
22 words, Penn State steps into the shoes of its manufacturers  
23 and the rights they derive from selling Penn State-branded  
24 products go to Penn State. And because of their argument that  
25 only the manufacturer is the source, we think it is important

1 here to have an instruction for the jury so that they  
2 understand that a license sore can still own a trademark and  
3 have trademark rights from that. And our instruction is  
4 entirely consistent with the Lanham Act. It's a separate  
5 section. And the Lanham Act does not require, you know,  
6 extensive quality control. But we're going to put on evidence  
7 of quality control. So I don't think that's an issue.

8 THE COURT: All right. Thank you.

9 MR. MCKENNA: Can I respond to that quickly? I  
10 just want -- I think Counsel's conflating two different points  
11 that I just want to make sure the Court is clear about. So  
12 the argument that Vintage Brand has consistently made is that  
13 with respect to understanding the use by Vintage Brand on --  
14 on its clothes that Plaintiff needs to prove that that's use  
15 as a trademark, that's got one definition under the Lanham  
16 Act, the use and commerce requires use to identify the source  
17 of a particular product. That's with respect to the proof  
18 regarding the nature of the use on Vintage Brand's products.

19 This argument is about the acquisition of rights by  
20 Penn State. We don't dispute that the Lanham Act says that a  
21 party is entitled to claim trademark rights by virtue of the  
22 rights that derive from its licensee. But it is the  
23 definition of a related company under the Lanham Act that in  
24 order to acquire rights in that way, you must establish  
25 quality control. So our -- again, our objection is that if

1 the jury is going to be instructed about rights acquired  
2 through licensing, they need the whole picture of what's  
3 required in order for that to be true.

4 MS. WHEATLEY: Your Honor, to my knowledge,  
5 Defendants have never challenged that there is quality control  
6 here, and we are going to put on evidence of the same, and  
7 they have not actually challenged Penn State's rights in that  
8 respect. And most importantly, they have not alleged any sort  
9 of abandonment affirmative defense, which is what they would  
10 have had to do if, at this late stage, they wanted to say Penn  
11 State does not control use of its marks. So a jury  
12 instruction on that point would be going to an issue that is  
13 not in the case. So I think it would be very, very confusing  
14 to the jury.

15 THE COURT: All right. I'll take that under  
16 advisement, as well. Thank you.

17 And finally, there seems to be an issue unrelated  
18 to the jury instructions. So we talked about this in camera  
19 earlier. Penn State, last Tuesday, filed a stipulation of  
20 facts between the parties, although it appears that the  
21 stipulated facts are not entirely stipulated to, as we  
22 discussed earlier off the record.

23 So specifically, as I understand it, Vintage Brand  
24 complains that Penn State is improperly refusing to stipulate  
25 to Vintage Brand never sold merchandise featuring certain

1 marks. Penn State, do you generally contest this fact? And  
2 furthermore, I should add, Vintage Brand objects to the  
3 inclusion of paragraphs 28 through 33 on relevance grounds.

4 So I'll start with you, Ms. Wheatley.

5 MS. WHEATLEY: We do contest the fact that -- that  
6 we should be required to stipulate that Vintage Brand has  
7 never sold goods with certain Penn State marks. There is  
8 testimony, under oath, that they have designated it goes to  
9 some of those marks. And we do not have a complete record of  
10 their website. There is evidence in the case that the  
11 memorabilia they assembled and that they applied to  
12 merchandise includes memorabilia which has the marks that  
13 they're saying we should stipulate they have never used. So  
14 we don't feel we can do that.

15 MR. HARMS: Yes, Your Honor. The fact that Vintage  
16 Brand never made available the Lion head or chipmunk, as it's  
17 occasionally called, and the paw print design on its website  
18 is completely uncontested in this case. Penn State is not  
19 going to put on any contrary evidence, and under the local  
20 rules, they are required to stipulate to that fact. The only  
21 party that's offering evidence contrary to that fact is  
22 Vintage Brand itself. And Vintage Brand is offering that  
23 evidence, the testimony of Ms. Maffey to prove that it's  
24 wrong, not to prove that the fact that those logos actually  
25 appear on the website.

1           So Penn State is not offering contrary evidence.  
2     The fact that it's not contested otherwise, they should be  
3     required to stipulate to it.

4           THE COURT: How soon do you need a ruling on that  
5     stipulation? Is it going to affect these openings?

6           MR. FINKELSON: I don't think the stipulation  
7     affects the opening. But it was our intent, Your Honor, to  
8     read and put in to evidence the stipulation before our first  
9     witness today, following openings. And this is a little bit  
10    of a different kind of factual stipulation because it's got  
11    visuals, and I know it's typically just read into the record.  
12    But it is our intent to present those stipulations to the jury  
13    at the start of the presentation of our case following opening  
14    statements.

15          THE COURT: All right. Well then I'll have a  
16    ruling for you -- I can make a ruling on that issue over the  
17    lunch hour. I'll give you that ruling before you begin your  
18    opening statements in an hour or so. All right. I think that  
19    covers it, at least based on what I can see from your papers  
20    over the course of the weekend.

21          All right. Well, let's say -- you'll need about an  
22    hour or so for lunch. I think realistically, we are probably  
23    -- and I need to research this one issue to my satisfaction.  
24    So we'll stand in recess, and we'll assume we'll be back on  
25    the record at about 1:30. Mr. Finkelson, you're going to open

1 for Penn State?

2 MR. FINKELSON: I am, Your Honor.

3 THE COURT: And, Mr. Fetters, you're going to open  
4 for Vintage Brand. You anticipate these openings, somewhere  
5 around half an hour each, I think?

6 MR. FETTERS: Yes.

7 THE COURT: And then we'll deal with -- I assume  
8 you have at least some witnesses lined up. Do you have a  
9 sense of -- is it a number of witnesses, Ms. Wheatley? Mr.  
10 Finkelson? Is it one or two? By the time we -- I'm just  
11 trying to discern where we will be. We will probably be -- we  
12 will probably be -- we will probably be done with opening  
13 statements somewhere in the 2:30 lineup. You might want to  
14 decide at this point whether we should take a short recess at  
15 that point or not. We can. I typically try to go an  
16 hour-and-a-half to an hour and 45 minutes, you know, before  
17 there's a recess. And Mrs. Rhinehart instructs the jurors,  
18 you know, use the restroom. This is the time to do it, on the  
19 recess. It's not to be -- I don't want to interrupt you in  
20 the trial. There apparently happens -- it happened downstairs  
21 last week in another trial. Unbelievable. Somebody had to go  
22 to the bathroom, you know, in between the recesses, in my  
23 mind. But it happened. So they get pretty clear instructions  
24 here on what they do and what they shouldn't do.

25 So you might want to chart that out in your mind in



1 terms of, you know, who you're going to call, the amount of  
2 time it will take for direct and cross examination, and again,  
3 I would like to get as much done today, the first day,  
4 disrupted, obviously -- necessarily disrupted by the voir dire  
5 process, which is nevertheless conducted, fairly  
6 expeditiously. So sort of think about that in terms of your  
7 lineup of people. But I think you'll be under way in the  
8 trial probably in the 2:30, to 2:45 time frame. And then we  
9 will press on accordingly.

10 Is there anything else I need to know before I go  
11 to lunch?

12 MR. FETTERS: No, Your Honor.

13 THE COURT: All right.

14 MR. FINKELSON: No, Your Honor.

15 THE COURT: All right. You'll have the one ruling  
16 on the one issue before the jury is reassembled so you can  
17 prepare accordingly with regard to the stipulations. All  
18 right. Very good.

19 Court will rise, then, until about 1:30 p.m. Court  
20 will rise.

21 (At 12:37 p.m., a lunch recess was held.)

22 (1:44 p.m.)

23 THE COURT: All right. We're back on the record  
24 after our luncheon recess. The jury remains in the jury room.  
25 Before we bring the jury in, I will briefly rule on some of

1 the outstanding issues that will impact our trial. First,  
2 given the parties' statements and Vintage Brand's statement  
3 that it will not pursue an anti-trust defense, I find that  
4 evidence related to anti-trust concerns is no longer relevant,  
5 and such evidence has little, if any relevance to an aesthetic  
6 functionality defense, and any possible relevance is  
7 substantially outweighed by the possibility of unfair  
8 prejudice confusing the issues and wasting time. Evidence  
9 related to anti-trust concerns will therefore be excluded from  
10 the trial.

11 Second, as to the issues regarding the proposed  
12 stipulations, frankly, it doesn't seem to the Court to be of  
13 any great reason why the parties cannot stipulate to the  
14 contested fact, for whatever reason, the stipulation cannot be  
15 reached. So I'm not going to put my thumb on the scale,  
16 so-to-speak, and force any stipulations to which the parties  
17 do not agree. And therefore, the parties should leave out  
18 Vintage Brand's proposed stipulation and also strike  
19 paragraphs 28 through 33 from the stipulations. The parties  
20 may present whatever evidence they believe is necessary to  
21 prove these facts, subject, of course, to the Federal Rules of  
22 Evidence.

23 So I think I've addressed the immediate issues we  
24 have to be concerned with. Mrs. Rhinehart, if you want to  
25 escort the jury in.

1 MR. MCKENNA: Your Honor, if we can bring the jury  
2 in. I want --

3 THE COURT: Slow down a little bit. You're  
4 excited, but the court reporter is not so much.

5 MR. MCKENNA: I just wanted to add one thing on the  
6 nominative fair use, which I understand you've still taken  
7 under advisement and not ruled on. Counsel referred to the  
8 Complaint. During the break, we had a chance to look at the  
9 Complaint again, and I recommend to the Court, in the  
10 Complaint, the Complaint -- all of the allegations of  
11 infringement are by references to what are called the  
12 infringing marks. The infringing remarks is a defined term  
13 and in the Complaint, the definition of infringing marks done  
14 entirely by references to the shirt. There's no separate  
15 allegations regarding infringement in any other way. There  
16 are allegations that the shirts are sold on the website. But  
17 there are no additional allegations that are specifically  
18 addressing infringement in any way, other than on the shirts.

19 Obviously, Vintage Brand can't have waived an  
20 affirmative defense to conduct that was not clearly  
21 articulated as infringing, which is what our nominative fair  
22 use has always been focused on, which is not the shirts, but  
23 the image -- the website references and all of the other  
24 things. So I just wanted to draw the Court's attention to  
25 that. I also draw the Court's attention to a recently decided

1 third circuit case, Artoss, A-r-t-o-s-s, Inc., versus Artoss  
2 GMBH. There's not a federal reporter citation, but it's a  
3 2024, West Law, 282, 7927. Holding that the trial court  
4 didn't err when instructing the jury on nominative fair use,  
5 even though it mentioned until the Eve of trial. Obviously  
6 this is not a circumstance where it was only mentioned on the  
7 Eve of trial. This came to the Court's attention and the  
8 Counsel in the Daubert hearing in May of 2023.

9 MS. WHEATLEY: Your Honor --

10 THE COURT: Well, do you have a microphone? All  
11 right. Use Mr. Finkelson's?

12 MS. WHEATLEY: I'll read from the Plaintiffs  
13 Complaint. Additionally -- this is paragraph 91.  
14 Additionally, Defendants' web page for Penn State is titled  
15 quote, Penn State Nittany Lion Vintage designs for apparel  
16 gear and clear attempt to associate Defendants' goods with  
17 Penn State and the goodwill Penn State has built over decades  
18 embodied in the university marks. I believe we very clearly  
19 stated that the text on the website was part of our  
20 infringement claim and we also in our count for federal  
21 trademark infringement referenced the advertising of the  
22 goods.' with contend that the Defendants were very much on  
23 notice that we allegation the website. This is in addition to  
24 repeated pictures of the full website and the body of the  
25 complaint.

1 THE COURT: Thank you.

2 All right. The Court am take that under  
3 advisement. Anything else?

4 MR. MCKENNA: No, Your Honor.

5 THE COURT: Let's get under way. Mrs. Rhinehart,  
6 escort the jury in.

7 (At 1:47 p.m., the jury entered the courtroom.)

8 THE COURT: You may be seated.

9 All right. We're ready to hear opening statements,  
10 I believe. Mr. Finkelson, you're opening for Penn State, I  
11 believe?

12 MR. FINKELSON: I am, Your Honor.

13 THE COURT: Go right ahead, sir.

14 MR. FINKELSON: Thank you. You can't take what  
15 doesn't belong to you. Someone else's home, their car,  
16 groceries you haven't paid for. And most importantly, for  
17 purposes of this case, you can't take somebody else's good  
18 name. Their identity. For my client, that good name, that  
19 identity is the Pennsylvania State University. Penn State and  
20 the symbols that the University owns and uses to communicate  
21 to the public who the University is and what it stands for.

22 Walk onto any one of the more than 20 Penn State  
23 campuses across the Commonwealth. Visit any of the  
24 businesses. Many of them family owned who make a living  
25 selling authentic Penn State merchandise with our permission.

1 And Penn State's identity is impossible to miss. The school  
2 traces its roots back to the 1,800s. And the evidence in this  
3 case will show that for decades and decades Penn State has  
4 protected its identity with trademarks. Words and logos that  
5 are registered with the United States patent and trademark  
6 office that the University owns and that the University uses  
7 to tell the world we are Penn State. We stand for education,  
8 for research, for community, for quality, and for excellence.

9 For Penn State, those words and symbols, its  
10 trademarks, which I think you can now see up on your screens,  
11 are symbols of the university's reputation. And for the  
12 businesses, many in Pennsylvania who play fair and by the  
13 rules, who seek and get permission to use Penn State's  
14 trademarks on merchandise and give some of the proceeds of  
15 those merchandise sales back to the University, Penn State's  
16 trademarks mean a livelihood.

17 But the evidence in this case will show that for  
18 these Defendants, from Seattle Washington, Penn State's  
19 trademarks are just a way to make a quick buck. By breaking  
20 the rules that everybody else plays by. By just taking and  
21 copying the trademarks that belong to Penn State and putting  
22 them on t-shirts, you can see them up on your screen and  
23 you'll hear about this during the trial, putting Penn State's  
24 trademarks on t-shirts and other merchandise that the  
25 Defendants sell on their own website without any permission

1 from Penn State at all. Profit unfairly and unlawfully from  
2 the reputation that Penn State and so many others that spend  
3 so much time, effort, and money, the millions of parents,  
4 students, faculty, alumni and Pennsylvania merchants who  
5 support the University. And we're here, ladies and gentlemen,  
6 to ask you please make the Defendants stop once and for all.  
7 Give us back our name.

8 I'm Dave fin, and together with my law partner,  
9 Lucy Wheatley and our team, we have the honor and the  
10 privilege of representing Penn State in this case, and I want  
11 to start on behalf of us, but most importantly on behalf of  
12 our client, Penn State, by saying thank you. Thank you for  
13 serving on this jury. We know what a sacrifice it is. It is  
14 taking you away from our families and your daily lives. And  
15 we're going to do our best in this trial to present the  
16 evidence to you as efficiently and as clearly as we know how.

17 So this is a case about trademarks. So first and  
18 foremost, what is a trademark. Well you already know more  
19 than you may think. Slide four, please, Mr. Burkhardt. A  
20 trademark can be a name, a logo, or a design. It's often  
21 referred to as a brand. And here's the thing. Anyone can own  
22 a trademark. Me, you, a mom and pop business, a community  
23 organization. Penn State. There are some examples of  
24 trademarks for apparel up on your screen. The United States  
25 Marine Corps, the band, the rolling stones, the Olympics, the

1 Pittsburgh Steelers, the Red Cross. But trademark symbolizes  
2 its owners' reputation. And it tells you, as a consumer, who  
3 stands behind the product.

4           You're going to learn in this case that trademarks  
5 are a type of property. And in many respects, owning a  
6 trademark is a lot like owning other types of product. Think  
7 of a car or your home. And just like a homeowner has every  
8 right to keep trespassers off of their land, a trademark  
9 owner, like Penn State, has the right to the exclusive use of  
10 its trademark property and the right to decide who else can  
11 use it. And when someone, here, the Defendants, takes a name  
12 or logo that belongs to someone else, Penn State, without  
13 permission and in a way that is likely to confuse the public,  
14 that's known as trademark infringement. It's also called  
15 unfair competition, which makes sense, right, because it's not  
16 fair to do that. It's not fair to Penn State. It's not fair  
17 to the small businesses who are playing by the rules. And  
18 it's not fair to consumers who may be confused in to thinking  
19 that Penn State stands behind these Defendants' merchandise,  
20 when that's not the case at all.

21           Which brings me to three things that I want to  
22 preview for you in our short time together this afternoon, and  
23 that the evidence in this case will show.

24           First, Penn State owns its name and logos as  
25 trademarks. In fact, as you'll hear, many of those trademarks



1 have been registered with the United States patent and  
2 trademark office for so long that they're known as  
3 incontestable. Nobody can say Penn State doesn't own them.  
4 Nobody can say that they're not valid trademarks.

5 Second, the Defendants, Chad Hartvigson and two of  
6 his companies, Vintage Brand and sportswear have sold Penn  
7 State apparel and merchandise on their Vintage Brand website  
8 without Penn State's permission. The evidence will show that  
9 the Defendants infringed Penn State's trademarks. They have  
10 competed unfairly. Third, the Defendants have done it on  
11 purpose and they will do it again in a heartbeat if you let  
12 them. And that's where Penn State needs your help.

13 Many cases that end up in front of a jury like you  
14 are about lots of money. I'm going to tell you from day one,  
15 this isn't one of those cases.

16 Yes, the Defendants have already profited wrongly  
17 from Penn State's trademarks. And they should pay a price for  
18 that. But the amount of money that Defendants have already  
19 made isn't why we're here today. We're here because Penn  
20 State, like any other university or organization or business  
21 who owns trademarks has an obligation to protect those  
22 valuable trademarks. And because we can't stop Mr. Hartvigson  
23 and his companies by ourselves.

24 As you'll hear, we tried because when all this  
25 started, that's exactly what Penn State asked Mr. Hartvigson

1 to do. Just stop. But Mr. Hartvigson and his companies  
2 wouldn't stop. Penn State didn't want to file this lawsuit.  
3 Penn State had to file this lawsuit to protect its trademark  
4 property, to protect its reputation, and to protect all those  
5 people out there who do respect Penn State's trademarks and  
6 who benefit from using those trademarks lawful.

7 But bringing this lawsuit, as you'll learn, only  
8 did the job part way.

9 As you'll hear, it led Mr. Hartvigson to put a  
10 temporary pause on selling Penn State merchandise until this  
11 lawsuit is over. The key word there is temporary. Because  
12 Mr. Hartvigson makes no bones about it, he and his company  
13 will start selling Penn State trademark merchandise again  
14 tomorrow, at the click of a button, unless you tell him it's  
15 not okay.

16 This trial is Penn State's only way to put a stop  
17 to Defendants' unlawful use of our trademarks for good.

18 So let's talk about those Penn State trademarks  
19 that are so important in this case. They're on the board that  
20 is up in front of you. Penn State owns other trademarks as  
21 well. But the ones that you see on the board are the ones  
22 that will all be focused on in this trial. The evidence will  
23 show that every one of these trademarks is meaningful and  
24 valuable. Not because they're especially pretty advertise.  
25 Not because Penn State is the only thing that you can call a

1 university or the Nittany Lion is the only mass could the that  
2 you can pick for a university. They're meaningful and  
3 valuable because of the reputation that Penn State and so many  
4 others in its community have built in these names. They're  
5 meaningful and valuable because these trademarks have come top  
6 represent Penn State and its reputation and nothing else.

7 As you'll learn, each of these trademarks also has  
8 a story. You'll hear that from Jackie he's pose. Ms. He's  
9 pose is the retired librarian. University. She worked at  
10 Penn State for 35 years and she literally wrote the book on  
11 Penn State's symbols and they're historical symbols. 's going  
12 to be the first witness we put on the stand this afternoon.  
13 Ms. Esposito can you please stand so the jury can see you?  
14 Thank you.

15 Let's start with the Penn State trademark. It's  
16 the one at the top of the board and everyone in this room has  
17 heard of this one. The earliest reference we could find was  
18 in a yearbook from 18 90. And in the early 1980's after many  
19 years of using the name Penn State, Penn State applied for and  
20 received from the United States patent and trademark office  
21 the first of many trademark registrations that it's received  
22 for the words Penn State in any font or style.

23 As you already know, trademarks are property. And  
24 just like your house or land comes with a deed or your car  
25 comes with a title that tells the world you own it. So, too,

1 in trademarks.

2 This is the official trademark registration for the  
3 trademark Penn State. You can tell by the gold seal that's on  
4 the very first page. It tells Penn State. It tells the  
5 world, it tells you that Penn State owns it and has the  
6 exclusive right to use it on merchandise.

7 The Pennsylvania state university trademark, the  
8 second one on the board, the University's official name T.  
9 Got that name in 19 53 and it's used it ever since. If you've  
10 ever been to a Penn State football game, the Pennsylvania  
11 State University is etched in stone right next to Beaver  
12 Stadium.

13 The University seal trademark. It's the third one  
14 down from the burden of proof. That, too, was created in 19  
15 53 when the University adopted the Pennsylvania state  
16 university as its formal name. It appears on a ton of  
17 authentic Penn State merchandise. But more importantly, it  
18 appears on every Penn State diploma. If you're a graduate of  
19 a college or a I offer the or a high school, a diploma  
20 symbolizes all the hard work you put in and that you made it.  
21 And for graduates of any of Penn State's campuses across  
22 Pennsylvania and for their families who helped them get over  
23 the line, the University seal symbolizes that accomplishment.

24 But you'll learn in this case that not only are the  
25 Defendants trying to get away with using the University seal

1 on the merchandise that they sell, they're actually trying to  
2 take the University seal away from Penn State. Believe it or  
3 not, they are going to ask you in this trial to cancel the  
4 seal trademark so that Penn State would not own its own seal  
5 any more.

6           They're claim is that the University seal, which  
7 truthfully reflects that Penn State is a public university,  
8 and it says the Penn State University right on it, looks too  
9 much like an insignificant any I can't of the Commonwealth of  
10 Pennsylvania to be a trademark in its own right.

11           Well, the patent and trademark office didn't think  
12 so. It granted Penn State a trademark registration for the  
13 University seal way back in 1984, and it's renewed it ever  
14 since. And the Defendants haven't located a single person who  
15 second guesses is that. The Nittany Lion shrine trademark.  
16 The next one down on the board, it's a logo of a sculpture.  
17 You probably don't know that, but there's a Nittany Lion  
18 shrine sculpture on virtually every Penn State campus. It's a  
19 place to go, the place to celebrate. The first one was  
20 actually a gift of the class of 1940. Four members of that  
21 went off from that class to fight for our country in World War  
22 II. The Pozniak lion trademark. The next to the last one on  
23 the board in front you. This one was defined by the artist,  
24 Ray Pozniak in the late 1970s. Throughout the 1980s, it was  
25 actually a primary of symbol of the university's athletic

1 programs, and when Mr. Pozniak passed away, the family granted  
2 the rights to the Pozniak lion trademark to Penn State, which  
3 has continued to honor the family's wishes by allowing a few  
4 groups to use the trademark going forward, the Nittany Lion's  
5 Wrestling Club, and a group called the Lion Ambassadors, which  
6 is run by Penn State Alumni, and as the name suggests, are  
7 ambassadors for the University for its legacy and for its  
8 reputation.

9 Every one of the trademarks that I've talked about  
10 so far has a registration with one of these gold seals on it.  
11 Issued by the Government that says it belongs to Penn State,  
12 not to the defense.

13 So when you see authentic merchandise out in the  
14 marketplace with these registered trademarks, you often notice  
15 it because it has a symbol with an R inside of it, and you can  
16 see it on the are. That's R or registered trademark.

17 What you'll also learn in this case is there's a  
18 second way in this country to own a trademark and have all the  
19 rights that come with owning it. If you use it first and then  
20 you use it continuously on products, it's yours, even if you  
21 don't register it. And no one else is allowed to use that  
22 trademark in a way that confuses the public.

23 That's the case with the last trademark on the  
24 board, the S lion. And you can tell it's one of those  
25 trademarks, because it has the letters TM next to it at the

1 bottom. That's TM for trademark. The S lion symbol has a  
2 long history dating back to when the Nittany Lion was pictured  
3 as having a mane. Bringing that history to life, Penn State  
4 has been branding apparel and merchandise with the S. Lion for  
5 years. Long before the Defendants ever launched their Vintage  
6 Brand website.

7 Now, Penn State authorizes hundreds of companies,  
8 large and small to put Penn State's trademarks on apparel and  
9 merchandise sold to the public online and in stores. Is that  
10 authorization is known as a license. Think permission. It's  
11 a mutual agreement between Penn State and its licensees and  
12 its mutually beneficial. Penn State grants those licenses  
13 with the help of a company called collegiate Licensing  
14 Company, which is one of several entities out there that help  
15 universities like Penn State connect with manufacturing and  
16 retail partners so that retail letters can sell authentic Penn  
17 State merchandise at all price points, low, medium, and  
18 higher, to meet customers' needs.

19 And they sell that authentic merchandise and make  
20 it available to customers pretty much everywhere, whether  
21 that's at the Kohl's that's across the street or the Walmart  
22 that's into or near the town where you live or online at  
23 dick's sporting goods dot com or at any other legitimate am  
24 legitimate websites. But you're here in this trial, what  
25 really sets Penn State apart from most other colleges and

1 universities is that so many of those legitimate authentic  
2 merchandise sales are made by businesses right here in  
3 Pennsylvania. Those Pennsylvania businesses, their employees  
4 depend on the sale of Penn State branded goods for their  
5 livelihood.

6 In fact, the highest seller any where of authentic  
7 Penn State branded merchandise, number one, is a store called  
8 family clothes line, a family business in State College. You  
9 can see a picture of the store front of the Family Clothes  
10 Line up on your screen. You can also see the Lion's Pride  
11 which is on the same street in State College, and is also  
12 among the top sellers.

13 Back in the gallery today, I saw Caroline Gummo, a  
14 Penn State alum, who runs the Family Clothesline, along with  
15 her husband. Ms. Gummo took time out of her day to drive here  
16 today because this case is important to her, to her family,  
17 and to her employees also. Ms. Gummo, can you please stand so  
18 that the jury can see you? Thank you.

19 I'd also like to ask Stephanie Petulla to stand.  
20 Ms. Petulla, also a local Penn State alum is Penn State's  
21 director of licensing and visual identity. She's at the table  
22 with us today. She's going to be here right next to you for  
23 the whole trial at our table on behalf of Penn State. Thank  
24 you, Ms. Petulla.

25 Ms. Petulla will testify to you about the Penn



1 State brand, that she helped build with these local businesses  
2 and others, to ensure that Penn State's trademarks are used in  
3 a way that helps the University and that protects its  
4 reputation, and about how the people who make and sell genuine  
5 Penn State merchandise adhere to Penn State's standards for  
6 quality, Penn State's standards for safe working conditions  
7 and for paid labor.

8 All of that is part of Penn State making sure that  
9 customers know that the University stands behind its  
10 merchandise, that customers can trust in it, so that when it  
11 arrives in the mail to you or to the person you gave it to as  
12 a gift, you get what you paid for, the real deal.

13 But when these Defendants sell what they sell,  
14 using Penn State's trademarks, they don't have permission.  
15 They don't have a license. None of what they sell is subject  
16 to Penn State's quality standards, and not a cent of the money  
17 made from those sales goes back to benefit the University or  
18 the company. It just goes straight into the Defendants'  
19 pockets.

20 So I've talked about the long history of Penn  
21 State, the long history of Penn State's trademarks. Defendant  
22 Vintage Brand's history is a lot shorter.

23 You'll learn that out in Seattle, Mr. Hartvigson  
24 started selling Penn State-branded goods on his website in  
25 2018. Those goods are printed and distributed by another

1 Defendant in this case, Prep Sportswear, which is another  
2 company for which Mr. Hartvigson is the CEO and a large  
3 shareholder. Vintage Brand, just like the company's name  
4 suggests. It sells so-called vintage versions of other  
5 people's brands. No one is off limits. Small colleges, big  
6 universities, professional sports teams. You name it.  
7 Vintage Brand sells it. Prep Sportswear prints and ships it.  
8 So you can see, this case is about a lot more than just Penn  
9 State.

10           So how do the Defendants pull it off? What you'll  
11 learn in this case is that Defendants start by acquiring  
12 pieces of memorabilia, of Penn State and others. Think about  
13 a ticket stub or a button or a pennant. But the Defendants  
14 don't resell that memorabilia. This is not a case about  
15 reselling on E-Bay or reselling at a secondhand store.  
16 Instead, the Defendants take that memorabilia and they run it  
17 through a scanner, a scanner, just like you may have seen at  
18 your office or at the local copy store. They create a digital  
19 image of Penn State's trademarks, and they transfer those  
20 trademarks onto a t-shirt or a sweatshirt or a hat, a mug, a  
21 pennant, and they slap a Vintage Brand label on it.

22           They literally copy the trademarks that Penn State  
23 and so many in its community have worked to build. And they  
24 put those trademarks on merchandise that Vintage Brand sells  
25 itself online.

1 Can I have slide 6, please, Mr. Burkhart? You're  
2 now looking at a page straight from the website that Vintage  
3 Brand uses to pull off those sales. You'll learn in this case  
4 that the Vintage Brand website looks very much like other  
5 websites out there selling authentic Penn State merchandise,  
6 and that's no accident.

7 You'll actually hear by video the testimony under  
8 oath of a consumer and Penn State alum, Meghan Matthew who  
9 went to the Vintage Brand website and thought that it was  
10 authorized by Penn State. It's not. But you can see on the  
11 screen in front of you why she thought it was. It's titled  
12 Penn State Nittany Lion's vintage designs. We put a red box  
13 around it for you. And as you can see, the few examples I  
14 showed you when I first started talking today are just the tip  
15 of the iceberg. The Vintage Brand website offers for sale one  
16 item after another, bearing the Penn State brand, the  
17 trademarks that belong to Penn State.

18 What false impression about a connection to Penn  
19 State does that give to consumers who visit the Vintage Brand  
20 website? That's a question about confusion, which is one of  
21 the things that you're going to be asked to consider in this  
22 case, whether any consumers are likely to be confused in to  
23 thinking that Defendants' merchandise is put out by or  
24 sponsored by, approved by or affiliated with Penn State when,  
25 in fact, it isn't.

1           As you'll hear, and it makes sense, Defendants'  
2 merchandise doesn't have to be identical to the real thing for  
3 there to be confusion. The question is whether it is similar  
4 enough to the real thing that when consumers see it, they  
5 think, mistakenly and incorrectly, that it has Penn State's  
6 permission.

7           Now, as with everything else in this case, you can  
8 and should use your common sense to answer that question. But  
9 we tested it for you, too. You're going to hear in this trial  
10 from David Franklyn, a trademark law professor at the Arizona  
11 State School of Law, who specializes in conducting what are  
12 known as trademark confusion studies. Professor Franklyn  
13 performed one of those studies in this case, and as he'll walk  
14 through with you, it confirmed what your intuition may already  
15 be telling you. Mr. Hartvigston and his companies are causing  
16 substantial confusion.

17           About one out of every three people Professor  
18 Franklyn tested, believed that Vintage Brand's merchandise had  
19 Penn State's blessing, which it doesn't. As you'll learn,  
20 that's more than twice, more than twice the amount of  
21 confusion that all the experts in this field agree is too  
22 much.

23           One more word on confusion. Having listened to me  
24 this afternoon, you already know a heck of a lot more than the  
25 average consumer about genuine Penn State merchandise on the

1 one hand and Defendants' merchandise, that the evidence will  
2 show, is infringing.

3 Take a look, please, at the merchandise that's been  
4 up on this display the whole time I have been talking. Ask  
5 yourselves. Is all of this merchandise the real deal? Or is  
6 it all of it fake? Or is some the real deal and some the  
7 fakes? And if it's a mix of both, which is which? If you  
8 can't tell for sure today, just imagine what you would have  
9 felt coming across these products yesterday while shopping  
10 online or seeing someone wear them down the street.

11 So, in the face of all of this evidence, is there  
12 any reason why Penn State should be treated differently than  
13 every other owner of trademark property. Is there any reason  
14 why the rules that apply to everyone else don't apply to  
15 Mr. Hartvigson and his companies? Listen to the evidence.  
16 Use your common sense. And the only answer to that question  
17 is no.

18 Mr. Burkhardt, can I have slide 7, please?

19 The Defendants will tell you that what they do is  
20 okay, as long as you just read the fine print. If you squint  
21 at the screens in front of you, you may be able to see an  
22 example of the fine print that the Defendants like to talk  
23 about at the top where Vintage Brand says on its website it is  
24 not affiliated with the Penn State Nittany Lions or the  
25 University book store or any college. These so-called

1 disclaimers, the evidence will show, they don't make any  
2 difference. The fine print doesn't prevent confusion; that's  
3 common sense; and the scientific studies that you'll hear  
4 about in this case confirm it.

5 Defendants may also try to tell you that what they  
6 do is okay because they sell to fans. But the evidence will  
7 show that selling to fans is no defense for the Defendants'  
8 trademark infringement, and it's no use for that trademark  
9 infringement either.

10 The university, as you already know, who have fans  
11 and supporters have trademark rights, too. Just like  
12 individuals and small businesses and professional sports teams  
13 and everyone else who owns and protects its reputation with a  
14 name or a logo.

15 I showed you earlier today the Steelers and Rolling  
16 Stones trademarks. When you buy a Steelers shirt at a game or  
17 a Rolling Stones shirt at the concert merchant, are you a fan?  
18 Yes. Would you also think that the Steelers or Rolling Stones  
19 must have given permission for their names and logos to be  
20 used on that t-shirt, that they're getting a share of the  
21 proceeds? Of course. Can you, as a fan, run home, snap a  
22 digital picture of the names and logos on that t-shirt and  
23 start selling t-shirts yourself, featuring The Rolling Stones  
24 and the Steelers? Of course not. And the Defendants can't do  
25 that to Penn State either.

1           And that brings me to my final point, and one that  
2 I would ask you to be on the look out for when you hear those  
3 and other excuses from the Defendants during the course of  
4 this trial.

5           What will the evidence show is the Defendants' real  
6 intent in this case. Slide eight, please, Mr. Burkhart.  
7 First, it will show that Defendants know exactly what  
8 trademarks are and how important they are. Both Vintage Brand  
9 and Prep Sportswear have trademarks in their own names or  
10 logos. You see on your screen, Vintage Brand's trademark on  
11 merchandise on the hat in the top corner. Why? Because  
12 trademarks mean something. They have value. And the  
13 Defendants know it. Vintage Brand even licenses its own  
14 trademark to Prep Sportswear. So they also both know what a  
15 license is and that you need to have one.

16           Second, the evidence will show that the Defendants  
17 knew full well that Penn State's names and logos are  
18 trademarks. When a trademark is registered in the United  
19 States, anyone can find out that it exists by searching a  
20 publicly-available website that the US Government makes  
21 available for anyone to search. Before -- before he started  
22 selling Penn State-branded goods, Mr. Hartvigson went to that  
23 website. He searched for and he found the trademark  
24 registration for Penn State. He knew it existed. But he went  
25 full steam ahead.

1           The Defendants know how to do this the right way.  
2       But when it came to Penn State, they chose, instead, to ignore  
3       the rules that all other businesses fairly play by. They  
4       chose, instead, to take and profit from Penn State's  
5       trademarks without our permission, and they'll do it again  
6       unless you stop them.

7           So let me end right where I started, because we  
8       think this case really is as simple as it may already seem to  
9       you.

10          The Defendants took what doesn't belong to them.  
11       They took and trespassed on Penn State's identity without  
12       permission in a way that is likely to confuse consumers into  
13       to thinking that Defendants have a relationship with Penn  
14       State. They don't. The Defendants are supporting and are  
15       supported by Penn State. They aren't. That's called  
16       trademark infringement. That's called unfair competition.  
17       And that's what we will prove to you over the course of this  
18       trial. Thank you.

19               THE COURT: All right. Thank you, Mr. Finkelson.

20               MR. FINKELSON: Thank you, Your Honor.

21       Mr. Fetters, opening?

22               MR. FINKELSON: I'm going to have my colleagues get  
23       this out of the way.

24               THE COURT: All right. Mr. Fetters, opening?

25               MR. FETTERS: Thank you, Your Honor.



1 THE COURT: Go right ahead, sir.

2 MR. FETTERS: Well, folks, by now you've figured  
3 out that this is a trademark case, and I'm guessing that when  
4 you received your jury summons, maybe some of you were hoping  
5 for a really interesting case, maybe a criminal case with  
6 facts similar to the things you see on shows like Date Line.  
7 Well, sorry to disappoint. This is a trademark case. But  
8 we'll try to make it as informative and useful for you as  
9 possible. But you're about to get a crash course, really, in  
10 trademark law.

11 And I'm guessing that for most of you, you probably  
12 haven't spent all that much time really thinking about  
13 trademarks or trademark law. And you might be wondering to  
14 yourself, what is this case really going to be about at its  
15 essence. Well, it's about consumers, folks just like you.  
16 You see trademark law is designed to protect consumers from  
17 being misled as to who is responsible for the quality of a  
18 producer's products. So when you hear the attorneys and the  
19 witnesses talk about consumer confusion, confusion as to  
20 source, that's what we're talking about.

21 Are consumers being misled in to thinking that  
22 Penn State is responsible for the quality of Vintage Brand's  
23 products. Let me put that slightly differently. Do consumers  
24 intend to purchase products put out by Penn State but they're  
25 being misled in to purchasing products from Vintage Brand

1 instead. That's what Penn State is here trying to prove. We  
2 see -- we say that consumers are not confused as to who is  
3 responsible for the quality of Vintage Brand's products. And  
4 we think that at the conclusion of the evidence, you'll find  
5 also that the answer is consumers are not being misled as to  
6 who is responsible for the quality of Vintage Brand's  
7 products.

8 And I think that there are really two primary  
9 reasons why the evidence will support you in reaching this  
10 very same conclusion.

11 The first relates to the buying experience when  
12 consumers do purchase Vintage Brand's products. Consider  
13 this. There is only a single place to purchase Vintage  
14 Brand's products. It's at Vintage Brand's websites, www dot  
15 Vintage Brand dot com. You can't get Vintage Brand's products  
16 at Macey's; you can't get them at Wegman's; you can't get them  
17 at the Family Clothesline. Only at Vintage Brand's website,  
18 Vintage Brand dot com.

19 And on that website, you'll see that Vintage Brand  
20 sells new merchandise, things like t-shirts, sweatshirts,  
21 socks, hats, glassware, wall art, posters, puzzles featuring  
22 designs like this derived originally from historic sports  
23 memorabilia, and that Vintage Brand offers products like these  
24 relating to hundreds of different universities and pro teams.

25 Now on this website, again, talking about the

1 consumer experience of buying Vintage Brand products,  
2 consumers see that Vintage Brand places prominent disclaimers  
3 throughout its website in different formats so that folks know  
4 for sure that Vintage Brand's products are not sponsored,  
5 licensed, or endorsed by any university or team.

6 But consider this. It's not just the fact that  
7 Vintage Brand places those disclaimers on its website. It's  
8 the fact that Penn State's licensees do something completely  
9 opposite of that. They pronounce to the world that their  
10 products are officially licensed Penn State products. And why  
11 do they do that? Well you'll hear from the evidence, there's  
12 two reasons: One, they're contractually required to do that,  
13 to affix officially licensed statements to their store fronts,  
14 to their websites, in their advertising, and on the products  
15 themselves. They affix officially-licensed labels and  
16 stickers that are so tightly controlled, that those  
17 officially-licensed stickers contain serial numbers and  
18 holograms where consumers can actually look up, by typing in  
19 that serial number on the website to confirm that those  
20 products are officially licensed.

21 And what he does that mean? Well, it means that  
22 consumers don't have to guess. If a consumer is genuinely  
23 interested in only acquiring officially-licensed Penn State  
24 merchandise, that consumer can do that, because Penn State's  
25 licensees makes sure that consumers know that. You'll hear

1 that this is a valuable marketing advantage to be able to  
2 promote your products as officially licensed Penn State  
3 products. And that's what those licensees get in exchange for  
4 working with Penn State and all of the controls that come with  
5 that.

6 And so again, what is Vintage Brand doing? They're  
7 doing the complete opposite. They're not saying on their  
8 website that they're offering officially licensed products.  
9 They're not say -- staying silent on the topic. They're going  
10 so far as to affirmatively tell consumers, in multiple  
11 formats, throughout the entirety of the website that their  
12 products are their own, that they are not sponsored, they are  
13 not licensed by any team or university or pro team.

14 Now, there's a second reason why the evidence will  
15 show that consumers are not being mislead as to whether Penn  
16 State is responsible for Vintage Brand's products. And that  
17 second reason is really more fundamental. And it's about the  
18 role of the historic memorabilia designs that Vintage Brand  
19 prints on its shirts. I said before that trademarks exist so  
20 that consumers know who is responsible for the quality of the  
21 product. And why is that so? Because we have a system where  
22 we want to ensure that consumers have an efficient way to go  
23 shopping, to make their buying decisions. And let me give an  
24 example of that.

25 I think maybe the most well-known trademark that

1 folks might think of is the Nike swoosh. When you see that  
2 Nike swoosh on the side of a shoe, you know immediately who is  
3 responsible for the quality of that shoe. That's because that  
4 Nike swoosh is a trademark, and that Nike swoosh is doing  
5 trademark work. That's an important concept throughout this  
6 entire trial. Trademark work. Communicating to consumers  
7 efficiently and effectively who is responsible for the quality  
8 of the shoe. It's not just the reputation of the trademark  
9 holder generally. That's a key distinction. The reputation  
10 of the trademark holder for producing the shoe. That's  
11 trademark work.

12 When Vintage Brand wants consumers to know who is  
13 responsible for the quality of Vintage Brand's products, you  
14 look to the label where it says Vintage Brand. You look to  
15 the sticker on Vintage Brand's hats, which says Vintage Brand.  
16 You look to the packaging that the products come in, which  
17 says Vintage Brand. That's all doing trademark work. It's  
18 acting like the Nike swoosh.

19 This -- this historical memorabilia art work that  
20 Vintage Brand prints on its shirts, it's not doing trademark  
21 work. You'll hear from Chad Hartvigson, who will testify that  
22 the reason that Vintage Brand prints historic memorabilia  
23 artwork on its products is because he hopes that consumers  
24 will find the artwork attractive. He hopes that consumers  
25 will have a sense of nostalgia, having looked at the artwork.

1 And perhaps most fundamentally, he hopes that by wearing these  
2 products, consumers can express their affinity, they're  
3 affection, their school spirit, their fandom for their  
4 favorite schools and teams. So that when folks wear these  
5 products to the games, they can show that they're part of the  
6 team. That's what this artwork does. It's not doing  
7 trademark work.

8 And what Penn State will say, as well, our  
9 trademark -- we have a trademark in our name, and that appears  
10 in this artwork. But this is not a copyright case. This is a  
11 trademark case. And what do trademarks do? They communicate  
12 to consumers who is responsible for the quality of the shirt.  
13 And so just because Penn State's name appears within the  
14 composition of historic memorabilia artwork and just because  
15 consumers think of the university in a general sense, that  
16 does not mean that consumers are being misled in to believing  
17 that Penn State is responsible for the quality of this shirt.

18 Now, I mentioned at the outset that this case is  
19 about consumers and that's true. But this case is also about  
20 another thing. It's about over reach. Over reach by the  
21 University. The University brought this lawsuit because it  
22 thinks that it has trademark rights over any image that simply  
23 causes consumers to think of the university and to think of  
24 the university's reputation as an educational services  
25 provider. Not the reputation as a product producer. But just

1 to look at these images and think of the university. That's  
2 not how trademark law works. And again, this is not a  
3 copyright case. It's about whether consumers are being misled  
4 as to the course of Vintage Brand's products.

5 Now let me add some context. Let me start first  
6 with Chad Hartvigson. Chad, who is here today, you'll hear  
7 him testify. Chad is a entrepreneur. He's a former  
8 professional baseball player, and he's a lifelong sports fan.  
9 And, in fact, this isn't Chad's first time to Williamsport.  
10 He was here in 1982 playing in the Little League World Series,  
11 with a team from Washington State that achieved a historic  
12 championship win over Taiwan, which was subsequently  
13 documented in an ESPN documentary.

14 While Chad went on to play professional -- or  
15 college baseball, he graduated with a degree in business, and  
16 after graduating, he was drafted to play professional  
17 baseball. When you hear Chad explain, that like many  
18 professional baseball players, he started off at the lowest  
19 level of the minor leagues. And he progressed his way up to  
20 the highest level of the minor leagues, triple A baseball.

21 And you'll hear Chad explain that, unlike the folks  
22 you see on t.v. playing in the big leagues, who are making  
23 millions of dollars, Chad, as a minor league baseball player,  
24 barely made enough money to afford food.

25 And so after he retired from professional baseball,

1 he was eager to put that business degree to work, and he was  
2 eager to make it in business. So fast-forward to 2003.  
3 That's when Chad first came up and founded his first apparel  
4 company called Prep Sportswear, or Sportswear, Inc. is the  
5 full formal name. And Sportswear was a first of its kind for  
6 many reasons. Prep Sportswear is an online apparel company,  
7 and it was the first to create a national database of youth  
8 sports leagues and teams, like Little League baseball teams,  
9 and K through 12 schools across the country where parents,  
10 students, coaches, fans of children playing in those leagues  
11 and on those K through 12 teams to go online, find their  
12 school or find their Little League, prepopulate it with  
13 templates so that fans and parents could buy apparel for those  
14 student athletes.

15 So, for example, if you were to go on to the Prep  
16 Sportswear website, you could search Williamsport Area High  
17 School, find that school, preload it with templates, with the  
18 school name, school colors, all customizable so that if you  
19 have a son who plays on the baseball team or a daughter who  
20 plays on the softball team and you want to order shirts for  
21 those kids to wear during practice, you could do that with  
22 easy-to-load templates and combinations and sizes that you  
23 can't find anywhere else.

24 Now, Prep Sportswear was not only innovative in its  
25 website platform, it was innovative in its manufacturing



1 process. You'll hear Chad explain that the traditional  
2 methods of printing these apparel under the old regime really  
3 was not cost effective. And so Chad, and Prep Sportswear  
4 created their own manufacturing and printing facility right  
5 here in the US, in Kentucky where all of its products were  
6 printed on demand, only after a customer placed an order. And  
7 under the old model, it was almost impossible for parents to  
8 get small batch clothing like this.

9 So prep sportswear effectively created a new  
10 industry within the apparel industry.

11 So through -- from 2003 until 2009, Sportswear  
12 focused on the youth sports league and K through 12 business  
13 model. And even at this -- even today, this continues to be  
14 the bread and butter of the company. But in 2009, Sportswear  
15 thought it would try something different, thought it would try  
16 expanding its product offerings, and so it decided to start  
17 offering licensed college logos printed on products, t-shirts  
18 and sweatshirts. They decided to do basically what everyone  
19 else was selling within that genre.

20 And so Prep Sportswear contracted with a company  
21 called licensing resources group, which through a series of  
22 mergers became Deerfield, which then became Collegiate  
23 Licensing Company or CLC. And under this license, Sportswear  
24 sold products featuring college's modern logos and included  
25 all of their acquired officially-licensed statements on the

1 website and on the products themselves. And over time, Chad  
2 came to find that the traditional collegiate licensing regime  
3 really wasn't all that compatible with sportswear directed to  
4 consumer, print on demand business model. The old licensing  
5 regime was really traditionally based on the traditional  
6 method of brick and mortar stores, wholesalers, retailers,  
7 each imposing their own mark-ups. And under the traditional  
8 regime, the licensing industry really wasn't being able to  
9 offer a lot of unique designs or color combinations or sizes.

10 And so by about 2020, that relationship with the  
11 CLC ceased, and those products are no longer offered.

12 And just to be clear, Prep Sportswear were never  
13 offered any products related to Penn State. That  
14 wasn't within the portfolio.

15 But let me back up to 2017. That's when Chad  
16 started considering an idea for Vintage Brand, and Vintage  
17 Brand would be a new company, but it would be based on  
18 something old, something very old. And that's historic sports  
19 memorabilia.

20 Now, Chad has been a life-long sports fan and a  
21 sports collector for a long time, and like many in the 1980s,  
22 Chad got his he start in sports collectibles, collecting  
23 baseball cards. Well, you'll hear Chad explain that his  
24 interest in sports collectable has greatly expanded, and he'll  
25 describe the fact that he has spent hundreds of hours meeting

1 with sports collectors, going to sports collectibles trade  
2 shows, searching on E-bay, going to collectors' houses and  
3 sifting through dusty boxes in garages and attics, all in the  
4 search for rare sports collectable from the 1940s, 50s, 60s,  
5 decades and decades ago. Why spend all this time doing that?

6 Well, once you see some of the artwork that  
7 appeared on these sports collectibles from the distant past, I  
8 think you'll get a sense of how amazing some of this stuff is.

9 What you see here are some examples of the Vintage  
10 Brand collection of sports memorabilia with artwork related to  
11 Penn State, and these are game brochures, and you can see that  
12 a lot of these brochures are adorned with artwork that are  
13 created by third parties that are cartoon-ish, really  
14 impressive, often related to two different teams.

15 Here are examples of stickers, decals, buttons  
16 within Penn State's collection. And by the way, the button at  
17 the bottom right should look familiar to you, because that's  
18 where this shirt came from, the I like Penn State shirt.

19 Here are some examples of historic team tickets.  
20 And these are particularly impressive for the artwork that  
21 used to come on these old tick its. And of course these  
22 tickets have information about the date that they've -- that  
23 these games were played. But contrast that to anyone who has  
24 gone to a modern sporting event with digital tickets. This  
25 kind of artwork just doesn't exist on tickets anymore.

1           And so what was Vintage Brand's process? Well,  
2 first, it was acquiring the complete collection of memorabilia  
3 that it has, which, by the way, consists of more than 25,000  
4 different items relating to hundreds of different universities  
5 and pro teams.

6           At that point, Vintage Brand's founders took the  
7 painstaking effort and process of enhancing or scanning the  
8 artwork that appeared from that memorabilia. And then, went  
9 through the painstaking process of enhancing those scanned  
10 images to deal with things like wrinkles, smudges, and to make  
11 them suitable for printing on new products, so enhancing for  
12 clarity and for vibrant color. And then the final step is  
13 offering those products with the enhanced artwork on things  
14 like coasters, mugs, t-shirts, sweatshirts, canvas wall art,  
15 all print on demand.

16           And Vintage Brand, as a startup, did not have its  
17 own manufacturing facility from the outset. And so Chad had  
18 Vintage Brand contract with his other company, Prep  
19 Sportswear, which did have a manufacturing facility in  
20 Kentucky to print all of Vintage Brand's products. You'll  
21 hear Chad explain that now that Vintage Brand is more  
22 established, it has its own manufacturing facility in  
23 Nashville where it prints all of its products to this day.

24           You'll hear Chad also explain that the company  
25 Vintage Brand is able to offer a huge array -- huge array of

1 design choices to consumers, as varied as the memorabilia  
2 artwork that it derives from, and it's able to do so at an  
3 affordable price, and it's able to sell those designs and  
4 products to consumers, even if they don't sell very much. And  
5 the reason it can do that is because it's directed to  
6 consumer, print on demand.

7           The old way of doing business in this industry is  
8 for retailers to acquire a large stock of inventory in  
9 advance, and that inventory is then placed on a rack or it's  
10 sold online. But because retailers often don't know which  
11 designs are going to be favored most by consumers through  
12 their purchasing behavior, it's inherently risky. And so that  
13 necessarily causes retailers to limit the number of designs  
14 that they offer, limit the number of color combinations, limit  
15 the sizes that can be purchased. That's not a problem for  
16 Vintage Brand and its business model of online, direct to  
17 consumer, print on demand. It can offer wide selection of  
18 image variety, a wide selection of color combinations, and a  
19 wide selection of sizes, everything from infant all the way up  
20 to 6X.

21           So now you know about Vintage Brand and its  
22 business model. Let's take another look at the Vintage Brand  
23 website. And remember, one of the reasons -- primary reasons  
24 I said that the evidence will show that consumers are not  
25 confused as to who is responsible for Vintage Brand's products

1 is because of the context of the entire buying experience on  
2 the Vintage Brand website.

3 What you see here is a screenshot of the Vintage  
4 Brand website, and you have to keep in mind these are static  
5 screenshots of a dynamic website, and so it's not quite a  
6 one-to-one translation in terms of what you see here and what  
7 the actual experience is on the website. But you see at the  
8 top left, the Vintage Brand name and stylized fee and logo.  
9 The Vintage Brand color scheme is black and white and that  
10 appears along with the name and logo on every page of the  
11 Vintage Brand website.

12 At the top, the home page is organized with hyper  
13 linked categories of college, baseball, football, basketball,  
14 Vintage athletes and more.

15 As you scroll down, there's arrangements of  
16 different mocked-up product offerings to help consumers and  
17 how they want to go shopping for Vintage Brand's products. So  
18 one of the first cluster of product offerings that you see  
19 here that consumers can hyperlink to expand these selections  
20 are just a variety of top colleges with historic artwork, and  
21 in this case, relating to the Auburn Tigers, Oklahoma Sooners,  
22 Notre Dame Fighting Irish, Florida Gators, Nebraska Corn  
23 Huskers, Ohio State, and Alabama.

24 So consumers can click on that link and shop  
25 similar designs related to other universities. Consumers can

1 shop, a popular option is two-team rivalries. So if your  
2 favorite school is commonly-playing each year in a big rivalry  
3 game, Vintage Brand has historic memorabilia designs related  
4 to that theme you can shop for. You can isolate and look at  
5 the entire directory of universities for which there's  
6 historic memorabilia artwork on the Vintage Brand website, or  
7 you can search by an individual at the university and find  
8 artwork related to that university.

9 What you see here is what the web pages related to  
10 Penn State artwork look like on the Vintage Brand website.  
11 And just scrolling down here, you see that the way this is  
12 organized is that Vintage Brand has digital mockups of a wide  
13 variety of products, coasters, wall art, sweatshirts,  
14 t-shirts, things like that, and that those different blank  
15 types are populated with mockups of the range of different  
16 memorabilia artwork that is available on the Vintage Brand  
17 website.

18 Now going back up to the top of this page, we see  
19 again the Vintage Brand name at the top left, and we have the  
20 disclaimers that are visible here and here. (indicating) And  
21 there's disclaimers also at the bottom of the page. Now  
22 remember, keep in mind, it's not so much that Vintage Brand  
23 has these disclaimers on its website. It's that Vintage Brand  
24 is not silent on the issue at all. And that Vintage Brand  
25 does not falsely proclaim to offer officially licensed

1 merchandise, and it's the fact that Penn State's licensees pro  
2 claim to offer officially licensed merchandise, and all of  
3 that combines to form 9 consumer experience when purchasing  
4 these products.

5           If a consumer were to click on one of the  
6 thumbnails and look at an individual product offering, you  
7 might see something like this. (indicating) Again, Vintage  
8 Brand's name is in the top left. If we zoom in on the product  
9 description, you see something like this, 1950 Penn State  
10 Nittany Lions mug and you'll hear from Chad explain his  
11 process of researching and attempting to date these historic  
12 images. In this case, Chad and Vintage Brand believe that  
13 this image first originated in 1950 on historic memorabilia.  
14 You'll see another disclaimer by Vintage Brand, not affiliated  
15 with or sponsored by Penn State Nittany Lions, and then below  
16 that is a description of the image itself. And it goes in to  
17 the history of the Nittany Lion mascot.

18           And that's there because it's important to tell the  
19 stories of these images, because that's what Vintage Brand  
20 believes these images do, that they tell stories, that they  
21 evoke a sense of nostalgia. Now if a consumer places an  
22 order, those products arrive at their doorstep with Vintage  
23 Brand packaging, what you see with the sticker on the box and  
24 the packaging in the top left. They arrive with Vintage  
25 Brand's name on the products, like you see on the label at the



1 neck and the brim of the hat.

2 And so that's the Vintage Brand website, and the  
3 indicators for that website as to why consumers are not  
4 confused as to source -- the source of Vintage Brand's  
5 products.

6 So let's now talk again about Penn State's  
7 licensees.

8 So what you see here is an excerpt from the  
9 contract between Penn State's licensing agent, CLC and one of  
10 CLC's licensees, Penn State's licensee, retail licensee, with  
11 language requiring that licensees affix official -- official  
12 license articles to all of its products that  
13 officially-licensed statements be included with all  
14 advertising and marketing. And at the bottom here, you see  
15 some examples of the holographic stickers and labels with  
16 unique serial numbers that those products come -- that are  
17 attached to the products. Again, when I mentioned that  
18 consumers can actually look up those serial numbers that they  
19 can determine that their product is officially licensed. This  
20 is an example from the college vault program of an officially  
21 licensed product game tag that's affixed to the product.

22 And these are some examples from the Family  
23 Clothesline. What you see on the left is right on the banner  
24 of the store front of the retail outlet at State College.  
25 They proudly proclaim on the banner for all to see, officially

1 licensed Penn State merchandise. There's a website address  
2 there. Penn State clothes dot com. And of course at that  
3 store you'll hear from the proprietor of that store that all  
4 of their products are related to Penn State. Their products  
5 don't -- they don't offer products related to the University  
6 of Alabama or other pro teams in the way that Vintage Brand  
7 does.

8           On the right, you see a screenshot from their  
9 website. And again, officially licensed appears in several  
10 locations, and, in fact, on every single page of website,  
11 every single page, it says officially licensed Penn State  
12 gear. So again, if a consumer wants officially licensed  
13 merchandise, they don't have to guess because Penn State's  
14 licensees make sure that consumers know that.

15           And it's no surprise that there is no evidence of  
16 actual confusion. In fact, Penn State will offer only a  
17 single witness who will attempt to testify on this issue of  
18 whether anyone is confused as to who is responsible for the  
19 quality of Vintage Brand's products.

20           But you'll hear that this customer is not any  
21 ordinary customer. In fact, she's not a customer at all. She  
22 is the president of the largest alumni association Chapter for  
23 Penn State University in Washington D.C. And you'll hear her  
24 testify, via deposition, and she'll explain that in the summer  
25 of 2022, she reached out to 100 different online businesses

1 offering products related to Penn State, 100 different online  
2 businesses with essentially an identical e-mail. She was  
3 soliciting free products related to Penn State that could be  
4 raffled off at an alumni association event. And when  
5 questioned about whether she visited the Vintage Brand  
6 website, she said she did, and she said that she saw two logos  
7 that she recalled seeing, and she was very firm about that.  
8 One she described as the chipmunk head logo, which is a lion  
9 head profile. And it looks a little bit like a chipmunk. The  
10 second one she described as a paw print logo. You'll hear  
11 from Chad and you'll take a look at all of the screenshots  
12 that you see from the Vintage Brand website. But you'll hear  
13 from Chad that neither one much those modern logos for Penn  
14 State were ever on the Vintage Brand website at any time. And  
15 in addition to this, the time frame that she claims to have  
16 been on the Vintage Brand website, the Vintage Brand web pages  
17 related to Penn State were not even live and available to the  
18 product. You heard from Counsel during opening statement that  
19 when Penn State brought this lawsuit, Vintage Brand  
20 temporarily took those pages down. That was in 2021. Ms.  
21 Matthew claims that she was on the website for Vintage Brand,  
22 looking at these pages in the summer of 20 22.  
23 There is no evidence of actual confusion. And, in fact, this  
24 is confirmed by the empirical scientific research that has  
25 been conducted.

1           One of the witnesses you'll hear from is Dr. Tulin  
2 Erdmen. Dr. Erdem is the chair of the marketing department at  
3 New York University Stern School of Business. And she has a  
4 PhD and she is an expert if consumer behavior. She conducted  
5 a scientific survey to assess consumer reaction to the Vintage  
6 Brand website to determine whether consumers are being misled  
7 in to believing that Penn State is the source of Vintage  
8 Brand's products. You'll hear Dr. Erdmen explain that  
9 consumers do not believe that Penn State is responsible for  
10 the quality of Vintage Brand products. There is no confusion  
11 as to source.

12           Now, Penn State will offer its own survey expert,  
13 David Franklyn. You'll hear from David Franklyn and you'll  
14 find that unlike Dr. Erdem, who has a PhD and is an expert in  
15 consumer behavior, Mr. Franklyn has no formal training in  
16 survey research. He has no PhD, and, in fact, he's a lawyer.  
17 One of the other experts you'll hear from is another defense  
18 expert, Dr. David Neal, and he was retained to critique Mr.  
19 Franklyn's survey. Dr. Neal also is a PhD and an expert in  
20 consumer behavior. And he'll explain that Mr. Franklyn's  
21 survey is deeply flawed in its methodology. He used a bad  
22 control. He distorted the commercial context, in which  
23 consumers purchased Vintage Brand's products and the summation  
24 is his conclusions are invalid. Junk science in, junk science  
25 out.

1           So as I wrap up my comments here, I refer back to  
2 the old familiar adage, there are often two sides to every  
3 story. You've just now heard from the other side. We're here  
4 today because Penn State thinks that it has the right, the  
5 trademark right to control all images that simply evokes  
6 thoughts of the university even when consumers are not  
7 confused as to the source of those products. And again, this  
8 -- this is not a copyright case. This is a trademark case.  
9 And trademarks are designed and intended to protect consumers  
10 from being misled as to who is responsible for the quality of  
11 that -- of those products.

12           Ask yourself. Do consumers intend to purchase  
13 products put out by Penn State but are misled in to purchasing  
14 products put out by Vintage Brand instead? That's what Penn  
15 State's trying to prove. We say they aren't. Or do consumers  
16 intend to purchase the products put out by Vintage Brand and  
17 that's what they get and that they know that those products  
18 are put out by Vintage Brand?

19           Or perhaps it's a third option. Maybe consumers  
20 don't even care who is responsible for the quality of Vintage  
21 Brand's products. If a consumer does not care who is  
22 responsible for the quality of Vintage Brand's products, that  
23 consumer necessarily cannot be confused as to the source of  
24 those products because source was never a consideration in the  
25 first place.

1 I said before that the images that Vintage Brand  
2 puts on its products are there to tell a story. Similar to  
3 what Sports Illustrated has done in its Commemorative 25-year  
4 Anniversary issue related to Penn State. The entirety of this  
5 issue, Sports Illustrated sells, presumably to Penn State  
6 fans, for compensation, the entirety of this magazine is  
7 related to stories about Penn State's football team. And just  
8 because Penn State's name and logos appear within this  
9 magazine, consumers aren't being misled in to thinking that  
10 Penn State is responsible for the quality of this magazine.  
11 This's how trademark law works. And that's no different than  
12 this.

13 The artwork that appears at the center of these  
14 t-shirts, even though the Penn State name is there, is not  
15 doing trademark work. It's about Penn State. It's not from  
16 Penn State. And that's the key trademark distinction.

17 At the conclusion of all the evidence, we think  
18 that you'll reach that same conclusion. At the conclusion of  
19 all of the evidence, we'll ask that you render a verdict in  
20 the Defendants' favor. Thank you.

21 THE COURT: Thank you, sir.

22 Counsel, if you don't disagree, I think we'll take  
23 a short recess at this point.

24 Ladies and gentlemen, Mrs. Rhinehart will escort  
25 you out for a 10-minute recess. Court will rise.

1 (At 3:00 p.m. a recess was held.)

2 (At 3:16 p.m., the jury entered the courtroom.)

3 THE COURT: All right. We're back on the record  
4 after a short recess. Plaintiffs' Counsel, are you ready to  
5 call your first witness? Ms. Wheatley?

6 MS. WHEATLEY: Your Honor, we'll start by reading  
7 the factual stipulations into record.

8 THE COURT: That's fine. Go ahead. As modified by  
9 the Court.

10 MS. WHEATLEY: As modified by the Court. And  
11 Mr. Burkhardt will share the stipulations on the screen so the  
12 that the jury is able to read along.

13 THE COURT: The parties, the Pennsylvania State  
14 University, Vintage Brand LLC, Sportswear, Inc., and Chad  
15 Hartvigson stipulate to the following facts:

16 1. Vintage Brand, LLC, formed in September, 2017.  
17 Vintage Brand's members, i.e., owners consist of cofounders,  
18 Chad Hartvigson, Erik Hartvigson, and Michelle Young. Chad  
19 Hartvigson owns 70 percent of Vintage Brand, while Erik  
20 Hartvigson and Michelle Young each own a portion of the  
21 remaining 30 percent. Vintage Brand has no W-2 employees.

22 2. Vintage Brand owns and operates a website,  
23 Vintage Brand dot com, where consumers can purchase  
24 print-on-demand apparel.

25 3. Vintage Brand owns a collection of sports

1 memorabilia, which consists of pennants, buttons, game  
2 tickets, decals, brochures, patches, stickers, trading cards,  
3 and programs bearing images from collegiate sporting events of  
4 the past. Memorabilia.

5 4. Vintage Brand's business model consists of  
6 selecting and scanning images or parts of images from its  
7 collection of memorabilia and memorabilia owned by others and  
8 printing those scanned images or parts of images on blank  
9 products such as t-shirts, sweatshirts, hats, socks, drinkware  
10 and other items. These products are offered for sale to  
11 customers across the United States through Vintage Brand's  
12 website at Vintage Brand dot com.

13 5. From 2018 to 2021, Vintage Brand's website  
14 included, among other things, a team page entitled Penn State  
15 Nittany Lion vintage designs on which it made available  
16 merchandise featuring roughly 35 images related to Penn State.

17 6. Vintage Brand first sold a product bearing Penn  
18 State-related images in May, 2018.

19 7. Sportswear, Inc., also called Prep Sportswear  
20 formed in 2005. Chad Hartvigson is CEO of Sportswear and owns  
21 30 percent of the outstanding shares in Sportswear. The  
22 remaining 70 percent are owned by 14 individuals.

23 8. Sportswear owns a manufacturing facility in  
24 Kentucky. Because Vintage Brand did not have its own  
25 manufacturing facility during the time relevant to this



lawsuit, Vintage Brand contracted with Prep Sportswear to manufacture and ship all of the goods sold through Vintage Brand's website and to provide customer service for Vintage Brand.

9. Penn State was founded in 1855.

10. Penn State owns US Registration No. 1308610 for the word mark Penn State, which covers decals, stickers, decorative wall plaques, drinking mugs, tankards, glasses, cups, tumblers, pennants, banners, shirts, t-shirts, sweatshirts, socks, hats and nontextile wall hangings.

11. US Registration, No. 1308610 was registered on December 11th, 1984.

12. Penn State owns US registration No. 5766698 for the word mark Penn State, which covers decorative magnets, drinking glasses, cutting boards, fabric flags, hooded sweatshirts, sweatpants, caps, being headwear, coasters, and jigsaw puzzles.

13. US Registration No. 5766698 was registered on June 4, 2019.

14. Penn State owns US registration No. 1315693 for the word mark the Pennsylvania State University, which covers decals, drinking mugs, tankards, glasses, cups and tumblers.

15. US Registration No. 1315693 was registered on January 22nd, 1985.

1           16. Penn State owns US Registration No. 5399989  
2 for the word mark the Pennsylvania State University, which  
3 covers hats, jackets, shirts, shorts, sweatshirts, and  
4 t-shirts.

5           17. US registration No. 5399989 was registered on  
6 February 13th, 2018.

7           18. Penn State owns US Registration No. 5742516  
8 for the word mark the Pennsylvania State University, which  
9 covers decorative magnets and fabric flags.

10           19. US registration No. 5742516 was registered on  
11 May 7, 2019.

12           20. Penn State owns US Registration No. 5305910  
13 for the Pozniak Lion design mark which covers hats, t-shirts,  
14 and sweatshirts.

15           21. US. Registration No. 5305910 was registered on  
16 October 10th, 2017.

17           22. Penn State owns US Registration No. 1276712  
18 for the University seal design mark, which covers decorative  
19 magnetic stickers, decals, stickers, decorative wall plaques,  
20 drinking mugs, tankards, glasses, cups, tumblers, pennants,  
21 shirts, t-shirts, sweatshirts, shorts, and hats.

22           23. US registration No. 1276712 was registered on  
23 May 8, 1984.

24           24. Penn State owns US Registration No. 5877080  
25 for the University seal design mark, which covers coasters,

1 ceramic mugs, fabric flags, banners of textile and hooded  
2 sweatshirts.

3 25. US Registration No. 5877080 was registered on  
4 October 8, 2019.

5 26. Penn State owns US Registration No. 1350286  
6 for Lion shrine design mark, which covers decorative magnetic  
7 stickers, decals, drinking mugs, tankards, glasses, cups,  
8 tumblers, pennants, shirts, t-shirts, sweatshirts, and hats.

9 27. US Registration No. 1350286 was registered on  
10 July 23rd, 1985.

11 28. Vintage Brand owns US Registration No. 6029818  
12 for the logo below for use in connection with online retail  
13 store services. Vintage Brand.

14 29. Vintage Brand has sold and or offered to sell  
15 t-shirts, sweatshirts, hats, koozies, pennants, drinkware,  
16 coasters, posters, magnets, wall art, socks, puzzles and  
17 cutting boards featuring images related to Penn State.

18 30. The Penn State-related images that have been  
19 depicted on the merchandise offered and sold by Vintage Brand  
20 include, but are not limited to the following images:

21 The Vintage Brand website has numerous pages,  
22 including A. A home page, the main landing page on the domain  
23 www dot Vintage Brand dot com, B, team pages, secondary  
24 landing pages with Vintage imagery related to specific teams  
25 or institutions, and C, product pages, pages showing digital

1 mockups of potential product offerings utilizing artwork from  
2 Vintage Brand's collection of memorabilia.

3 32. A representative screen capture of Vintage  
4 Brand's Penn State Nittany Lion's vintage designs team page is  
5 shown here.

6 33. The Vintage Brand website features specific  
7 pages for each item offered for sale. An image of the top of  
8 an example product page is shown here.

9 34. Vintage Brand's Penn State Nittany Lions  
10 Vintage designs team page contains text beneath the header  
11 which reads. Vintage designs not affiliated with, licensed or  
12 sponsored by any college, team, or league. Vintage Brand's  
13 product pages showing merchandise with Penn State-related  
14 imagery contain text beneath the header which reads by Vintage  
15 Brand TM, not affiliated with or sponsored by Penn State  
16 Nittany Lions.

17 35. Vintage Brand sold 1,269 products through the  
18 Penn State Nittany Lion store on Vintage Brand dot com.

19 36. Vintage Brand received revenues from sales  
20 through the Penn State Nittany Lion store amounting to  
21 \$23,219.27.

22 37. Neither Vintage Brand, Prep Sportswear, nor  
23 Chad Hartvigson have a license to use any of Penn State's  
24 trademarks.

25 THE COURT: Very good. Thank you.

1 MS. WHEATLEY: I'm afraid another boring part. Now  
2 I'm going to move in to evidence our large group of exhibits  
3 that the parties have agreed can be admitted.

4 THE COURT: Fine. You may do that.

5 MS. WHEATLEY: The Plaintiffs move to admit P-2,  
6 P-4, P-6, P-8, P-10, P-12, P-14, P-16, P-18, P-20, P-23, P-24,  
7 P-26, P-27, P-30, P-31, P-73, P-77, P-103, P-107, P-132,  
8 P-137, P-140, P-142, P-147, P-149, P-170, P-172, P-174, P-175,  
9 P-176, P-214, P-218, P-219, P-247, P-265, P-267, P-269, P-270,  
10 P-272, P-274, P-277, P-279, P-280, P-283, 85, P-287, P-289,  
11 P-292, P-293, P-295, P-298, P-303, P-304, P-305, P-306, P-307,  
12 P-308, P-309, P-310, P-326, P-341, P-342, P-354, P-355, P-363,  
13 P-364, P-383, P-407, P-409, P-421, P-423, P-424, P-425, P-427,  
14 P-429, P-431, P-432, P-434, P-435, P-437, P-438, P-440, P-442,  
15 P-443, P-445, P-446, P-448, P-449, P-456, P-457, P-460, P-461,  
16 P-462, P-463, P-465, P-466, P-467, P-470, P-471 P-472, P-482,  
17 D-126, D-137, D-139, D-141, D-185.

18 That's all, Your Honor. So we would move to admit  
19 those into evidence.

20 THE COURT: Objection from Defense counsel?

21 MR. FETTERS: No objection, Your Honor.

22 THE COURT: Duly admitted. Thank you.

23 Ladies and gentlemen, the reading of the  
24 stimulation and the recitation of the exhibits that Counsel  
25 have agreed to is going to save us a great deal of time. I

1     thank Counsel for their courtesy and professionalism for  
2     agreeing to the stipulations and agreeing to the admission of  
3     those exhibits.

4                 With that said, Plaintiffs ready to call your first  
5     witness.

6                 MS. WHEATLEY:   Yes.

7                 THE COURT:    You may do so.

8                 MS. WHEATLEY:   Plaintiff calls Jackie Esposito to  
9     the stand.

10                THE COURT:    Ms. Esposito, come forward and be  
11     sworn, please.

12                MR. FETTERS:   Your Honor, may we have a brief  
13     sidebar?

14                (A discussion was held at sidebar off the record.)

15                (the witness, Jackie Esposito was sworn.)

16                COURTROOM DEPUTY:   Go ahead and have a seat.   The  
17     chair does not move.   Can I get you to state your full name  
18     and spell your last name for the record.

19                THE WITNESS:   My full name is Jacqueline Esposito,  
20     J-a-c-q-u-e-l-i-n-e-.   The last name is Esposito,  
21     E-s-p-o-s-i-t-o, but I go -- I'm known by Jackie.

22                THE COURT:    Go right ahead, Ms. Wheatley.

23                MS. WHEATLEY:   Thank you, Ms. Esposito.

24                                 DIRECT EXAMINATION

25     BY MS. WHEATLEY:

1 Q. Can you tell the jury where you live?

2 A. I live in State College, Pennsylvania.

3 Q. Are you currently employed full time?

4 A. I am not. I'm retired.

5 Q. Where are you retired from?

6 A. I'm retired from Penn State. I worked at Penn State for  
7 35 years.

8 Q. And what was your job title at Penn State?

9 A. I was the University archivist and special projects  
10 librarian.

11 Q. And when did you start working at Penn State?

12 A. October of 1986.

13 Q. And when did you retire from the University?

14 A. July 31st, 2021.

15 Q. Since you've retired, have you had any further  
16 involvement with the University?

17 A. I do have involvement with the University. I have  
18 speaking engagements for the alumni association for the  
19 life-long living -- life-long learning organization. And I am  
20 a site supervisor for the history department for interns that  
21 work at historical societies.

22 Q. And so that I don't have to do that math, how long did  
23 you work for Penn State?

24 A. 35 years.

25 Q. And what is your educational background?

1 A. I have a Bachelors of Arts in American political history  
2 from St. Joseph's College in Brooklyn, New York. I have a  
3 Masters of arts from St. John's University in American  
4 Political History and African studies, and I had everything  
5 but a dissertation in higher education history at Penn State.

6 Q. And can you tell the jury what your job at Penn State  
7 entailed?

8 A. The University archivist is in charge of documenting --  
9 collecting, processing, and making accessible the documents of  
10 the history of Penn State going back to 1855. So that would  
11 include all sorts of documents, everything from board of  
12 trustee meeting minutes to faculty members' papers, student  
13 organization papers, and it represents all of the 24 campuses,  
14 the Hershey Medical School and the Dickinson Law school.

15 Q. And can you give the jury a size -- an idea of the size  
16 of the university archive?

17 A. The University archive is about 25,000 cubic feet of  
18 records, those nice white boxes sitting all over the  
19 courthouse here. It also is over a half a million  
20 photographs. A little bit over -- the library itself is 7.5  
21 million books. The archives itself has over a half a million  
22 books, specifically related to Penn State history, as well as  
23 artifacts and memorabilia, everything from Evan Pew's barn  
24 door to the shovels for various dedications of buildings.

25 Q. And how long has the University had an archive?



1 A. The University archive was established in 1904 in  
2 anticipation of the 50th anniversary. So the 50th anniversary  
3 would have been in 1905. The first archivist was a Penn State  
4 history faculty member who began collecting materials. He  
5 collected everything from General Beaver's documentations from  
6 his time as a civil war general and a member of the board of  
7 trustees, as well as from his years of governor of  
8 Pennsylvania to all of the documents for the Commonwealth  
9 history that are duplicated in the Penn State archives --  
10 Pennsylvania State archives down in Harrisburg.

11 Q. And separate from your job at Penn State, do you  
12 currently have a personal interest in the history of Penn  
13 State?

14 A. I have written at least one popular book about Penn  
15 State. I've also written numerous articles about higher  
16 education implications about Penn State. I'm also very  
17 interested in written articles about Penn State women, and  
18 about student organizations and the conflict -- the conflux of  
19 town and gap. It's really important to understand the history  
20 of State College by understanding the relationship between  
21 town and gap.

22 Q. And I think you mentioned it, but -- if I may publish?  
23 Ms. Esposito, can you tell the jury what this is? I can bring  
24 it up?

25 A. No. I have it. It's the Nittany Lion, an Illustrated

1 Tail. It's the book that I wrote with a co-author about all  
2 the various Nittany stories and legends that go back through  
3 the history of Penn State.

4 Q. And can you tell the jury what's shown here on the cover?

5 A. The cover is the Nittany Lion shrine.

6 Q. And what sort of research did you conduct to write this  
7 book?

8 A. In addition to conducting over 40 oral history interviews  
9 with everyone from the class of 1940 class president and the  
10 editor of the student newspaper to people -- to men who wore  
11 the mascot -- they wore the suit. We also did interviews with  
12 various historians and environmentalists about the stuffed  
13 Lion. We also did research in the University archives and the  
14 Pennsylvania state archives and in various other archives  
15 about the role of mascots and the role of symbols at  
16 universities.

17 Q. And what got you interested in writing a book about the  
18 Nittany Lion?

19 A. I got tired of answering the question, what is a Nittany  
20 Lion. Almost every single day in my job, somebody would call  
21 and ask what is a Nittany Lion. And it was either what is its  
22 gender, what type of Lion is it. Was it a cougar or a puma or  
23 -- not an African Lion. But what exactly was the Nittany  
24 Lion. What were the Nittany traditions. Who was Princess  
25 Nittany. And I thought, mistakenly, that if I collected them

1 all and put them together and created an eight-page brochure,  
2 I would never have to answer that question again.  
3 Unfortunately, the eight-page brochure became a 265-page book.  
4 It also became an eight-page brochure. I did stick to that.  
5 But it meant that I became the person to ask when you had  
6 questions about Nittany Lion history.

7 Q. And here you are today.

8 A. And here I am today.

9 Q. And when was this -- your book on the Nittany Lion  
10 published?

11 A. 1997. It is still the number one selling book for the  
12 Penn State press.

13 Q. So as I think the jury has already seen in opening, some  
14 of the trademarks in this case are representations of the  
15 Nittany Lion. So I'd like to discuss him to start. So in  
16 your time in Penn State archivist, is it fair to say your work  
17 encompassed research related to the Nittany Lion?

18 A. Yes, it did. It encompassed that kind of research almost  
19 every day.

20 Q. Now to begin, was Penn State always associated with the  
21 Nittany Lion?

22 A. No. The college had two mascots prior to the Nittany  
23 Lion. The first mascot was Old Coalie. It was a mule that  
24 was purchased to help move lime stone to build the original  
25 main administration building. He was the mascot for about 40

1 years. His skeleton was kept after he died and is still on  
2 display in the student union building today. The second  
3 mascot was a pair of bull dogs that were purchased to guard  
4 the ladies cottage. They were purchased with the thought that  
5 they would protect the ladies from scandalous young men coming  
6 to visit. And it was the bull dogs that were replaced by the  
7 Nittany Lion in 1904.

8 Q. Can you tell the jury how the Nittany Lion then came to  
9 be Penn State's mascot?

10 A. In 1904, the Penn State baseball team was on an eastern  
11 road trip. At that point in time, it meant they got on a  
12 train and went to various different schools over the course of  
13 a week. At the end of the road trip, they were at Princeton  
14 and they were being given a tour of campus and Princeton has  
15 the Princeton tiger, and the Princeton's students were  
16 bragging about how strong the Princeton Tiger was and Joe  
17 Mason, who was the third baseman, bragged that back up at Penn  
18 State, we had the Nittany Lion that had never been beaten in a  
19 fair fight so watch out, Princeton Tiger. He went on to score  
20 three -- three times in the baseball game, and in his career  
21 at Penn State, the four times they played Princeton, they won  
22 three out of the four times. He went back to campus and they  
23 -- most of the athletes lived in a building known as the track  
24 house. They started talking about it and writing it up and  
25 started advocating for the Nittany Lion to become the mascot

1 of the school. That was in 1904.

2 Q. Okay. And was there ever a real Nittany Lion?

3 A. There was a taxidermy Lion that was on campus. It was in  
4 a display of animals that was in the first floor of the main  
5 administration building. It was on display. It had been  
6 given to Penn State in the 1880s. It had been captured in  
7 1859 and stuffed and taxidermied and kept by a family. It was  
8 used like a rocking horse. And they donated it to Penn State  
9 to be used as part of the zoology department to demonstrate  
10 extinct animals.

11 The Nittany Lion was sent to two world's fairs as  
12 an example of an extinct animal. He was then sent to the  
13 Carnegie Museum in Pittsburgh and was on display in an exhibit  
14 for over 40 years. When that exhibit came down, the curators  
15 of the Carnegie Museum contacted Penn State and asked them if  
16 they wanted their Lion back. And a faculty member in zoology  
17 went with two graduate students to the Carnegie Museum and  
18 brought the Lion back.

19 Q. I'd like to put up on the screen demonstrative P-232,  
20 which --

21 MR. FETTERS: No objection.

22 BY MS. WHEATLEY:

23 Q. Can we publish a picture for the jury to see?

24 A. That is the Nittany Lion that was in the old main museum,  
25 and it was on display at the Carnegie Museum. It is now on

1 display at the old sports museum on the second floor. It has  
2 been conserved -- a conservator from the Smithsonian  
3 Institution came up and conserved it. She found out that it  
4 had been treated with arsenic originally. So it had to be  
5 neutralized. And it had to have its mangy areas replaced with  
6 fur and the fur in the mange areas is actually rabbit fur,  
7 because if you do DNA testing, we want the real lion fur and  
8 not the rabbit fur, and so that distinguishes that. There has  
9 been DNA testing that proves that it's nearest relative is the  
10 Colorado mountain Lion.

11 Q. And during Mr. Fetter's opening, he showed a screenshot  
12 of a little blurb on the Vintage Brand page about the Nittany  
13 Lion?

14 A. Um-hum.

15 Q. And did you have any thoughts on that?

16 A. It was with the 1950s mug --

17 Q. Yes.

18 A. -- that was shown in the opening. And the description  
19 with the 1950s mug was that Joe Mason was embarrassed and that  
20 he -- there was no mascot. And neither one of those  
21 statements are true. Joe Mason bragged. As most -- he --

22 MR. HARMS: Objection.

23 THE COURT: Is there an objection?

24 MR. HARMS: Objection. Foundation. Personal  
25 knowledge.

1 THE WITNESS: We have --

2 THE COURT: Hold on. Go ahead. Ms. Wheatley.

3 MS. WHEATLEY: Ms. Esposito is the University  
4 archivist who has written a book on the history of the Nittany  
5 Lion.

6 THE COURT: Objection noted. Overruled. I'll let  
7 you explore. Go right ahead.

8 MS. WHEATLEY: Go ahead, Ms. Esposito.

9 THE WITNESS: Joe Mason was a Penn State student  
10 and a long-term alum, and he actually tells his own story  
11 about the -- how the -- what happened in Princeton when the  
12 Lion shrine sculpture was dedicated in October of 1942. We  
13 have the transcript of that in the archives. And it doesn't  
14 reflect the story that's with the 1950s mug.

15 BY MS. WHEATLEY:

16 Q. Thank you, Ms. Esposito.

17 A. I'm sorry.

18 Q. No. Don't be sorry. And so this was sort of the  
19 original Nittany Lion, what we have on the screen. Have there  
20 been other versions of the Nittany Lion over the years?

21 A. Yes, there have. There have been other examples of the  
22 Nittany Lion. There have been representations that included  
23 an African Lion. There have been other representations that  
24 have been done by student organizations.

25 Q. So I'd like to look at another one, demonstrative P-233,

1 which I understand is without objection.

2 MR. HARMS: No objection.

3 BY MS. WHEATLEY:

4 Q. All right. Can you tell the jury what we're seeing here?

5 A. We're seeing a paper mache lion that actually looks like  
6 a pig. It's a paper mache lion that was done by the students,  
7 probably for the homecoming parade. That's usually when they  
8 used a lot of paper mache. It's from 1910. And it would have  
9 been -- the reason I'm thinking it's homecoming, is because it  
10 has the letter S for state, and it has the keystone, which  
11 were symbols used by Penn State back in 1910.

12 Q. Did Penn State ever claim trademark rights in this  
13 version of the Nittany Lion?

14 A. No.

15 Q. All right. So I'd like to discuss now how the Nittany  
16 Lion evolved to get to the Lion shrine mark Mr. Finkelson  
17 talked about in opening. Can we put up a demonstrative of the  
18 Nittany Lion shrine. And, Ms. Esposito, I have to warn you,  
19 when you touch the screen, it makes those blue dots.

20 A. I'm sorry.

21 Q. No, don't be sorry. I don't know how to make them go  
22 away.

23 THE COURT: Mrs. Rhinehart will take care of that.

24 MS. WHEATLEY: Thank you very much.

25 THE WITNESS: I'll sit on my hands.



1 BY MS. WHEATLEY:

2 Q. Do you recognize this logo on the screen?

3 A. It's the logo that represents the Nittany Lion shrine  
4 that was built on campus and dedicated in 1942.

5 Q. And the lion shrine that's on campus, I believe earlier  
6 you had said this was a picture?

7 A. Yes.

8 Q. Does -- do physical versions of it exist anywhere else in  
9 the Penn State system?

10 A. The full size lion shrine is only at University Park.  
11 Every other location under the Penn State's purview has a  
12 three-quarter size replica that sits either in the lobby or a  
13 prominent place on campus.

14 In addition, the same sculptor who sculpted this  
15 Lion created a model of replicas that are given out for  
16 anniversaries and sold and marketed in stores, department  
17 stores and stuff.

18 Q. The replicas or anniversaries you mentioned, what sort of  
19 anniversaries are those?

20 A. They're given to employees when they've reached certain  
21 landmarks, like 10 or 25 years. They're given for outstanding  
22 alumni. They are usually made in stone and handed and given  
23 as an award.

24 Q. And can you -- are you familiar with how the Lion shrine  
25 came to be built?

1 A. Yes.

2 Q. Can you tell the jury of how the idea for a Lion shrine  
3 statue first arose?

4 A. The towns people in downtown State College got tired of  
5 having pep rallies on the corner of College and Allen --  
6 that's a major intersection in town. One of the pep rallies  
7 got particularly out of control. They had a big bonfire, and  
8 it got lit with the wrong kind of fuel. And even the  
9 quarterback got knocked down by the fuels about a mile down  
10 the street. And the townspeople went to the president of the  
11 University and said you have got to find a place on campus for  
12 your students to have pep rallies. And the President of the  
13 University put together a committee involving art faculty, the  
14 president of the student class, the editor of the Collegian  
15 newspaper and several other representatives come up with a  
16 place on campus where they could have a place for the students  
17 to gather. They chose a place that was centrally located. It  
18 would be by old Beaver Stadium, but -- which is now a parking  
19 lot. The Nittany Lion Inn and rec hall, which was brand new.  
20 It had been built in 1939. And once they decided a location,  
21 they contracted with a sculptor who was known for sculpting  
22 animal sculptures. And that was Heinz Warneke. He was known  
23 in Pennsylvania because he sculpted the mother elephant and  
24 its baby at the Philadelphia zoo. It's still on display if  
25 you go to the Philadelphia zoo. They contracted with Heinz

1 Warneke, and he designed and built the Lion shrine sculpture.

2 Q. And who paid for the Lion shrine sculpture?

3 A. The money for the Lion shrine sculpture came from the  
4 class of 1940 as a class gift.

5 When students started as freshman, they had a  
6 deposit that was put into their accounts. That deposit was  
7 held for all four years. And at the end of four years, they  
8 could designate where the money went. In 1940, the students  
9 voted on two options, either the shrine or a scholarship. And  
10 they voted for the shrine.

11 Q. Now, in -- in 1942, were all of the members from the  
12 class of 1940 able to attend the dedication of the shrine?

13 A. No. As a matter of fact, the class president, who was a  
14 major person involved in selecting the animal and selecting  
15 the sculpture was fighting -- building bridges in France  
16 during World War II. There were significant people at the  
17 dedication, and one of them was Joe Mason.

18 Q. And you mentioned that a sculptor named Heinz Warneke  
19 built the shrine. Was anyone else involved in building the  
20 shrine?

21 A. Heinz Warneke himself had an assistant. And the project  
22 actually was part of a public work -- public arts work project  
23 that the art faculty had students participate in. So you, as  
24 a student, could go by the shrine as they were sculpting it.  
25 They used a system called pointillism, where they would chip

1 away at the lime stone. And you could help do that. It was  
2 the second public art project on campus. The first was a  
3 series of murals that were in the main administration  
4 building. They were done by Henry Varnum Poor, who was a  
5 well-known muralist who had done many works progress  
6 administration projects in post offices, including one that  
7 was down here in Williamsport.

8 Q. Now you mentioned, I believe, that Mr. Warneke was hired  
9 by the University. Was he paid for his work?

10 A. He was paid \$5,400 to sculpt the shrine.

11 Q. And after he built the shrine, did Mr. Warneke do any  
12 other work for the University on the shrine?

13 A. He designed the three-quarter replicas. He also designed  
14 the smaller replicas for sale and for awards. He also came  
15 back several years later when someone had taken a sledge  
16 hammer to the shrine and knocked off the ear. He came back to  
17 replace the ear. By that point, he was in his late 80s. And  
18 they picked him up at the airport and had hoped to take him  
19 straight to the Nittany Lion Inn so he could rest. But he  
20 wanted to see his lion. And when he got to his lion, he  
21 touched where the ear was broken and he cried. It's one of  
22 those stories that, you know, touches me when I hear it. We  
23 have pictures of him at the site when he's touching the ear in  
24 the archives.

25 Q. And from your work in Penn State, do you have information

1 about how often the shrine is visited?

2 A. The shrine is the most heavily visited site at Penn  
3 State. It is -- because it's open in the public, it's open  
4 24/7, so people can go -- it's visited hugely during home  
5 football games and the lines at graduation go for miles.

6 There was a survey done by Penn Live, which is a  
7 news feed down in Harrisburg about 10, 12 years ago, and they  
8 cited the Nittany Lion shrine as the second most visited site  
9 in Pennsylvania; the first most visited site is the Liberty  
10 Bell.

11 Q. And the two dimensional version you have on your screen,  
12 do you recall, from your time at Penn State, whether the  
13 university licenses this image to be put on merchandise?

14 A. Yes, it did.

15 Q. And have there been various versions of the shrine  
16 trademarked?

17 A. There -- various ways that you show this shrine. You can  
18 show this shrine four dimensionally, in various different  
19 positions.

20 Q. And I know you started in the 1980s. Was the University  
21 using the shrine logo in the 1980s?

22 A. The University was using the shrine logo from the time it  
23 was created in 1942, when it was dedicated in 1942.

24 Q. I'd like to transition to a different one of the  
25 trademarks Mr. Finkelson showed in opening. Can you put up

1 the picture of the Pozniak logo? Ms. Esposito, do you  
2 recognize this image?

3 A. This is the Pozniak lion.

4 Q. And who created this?

5 A. Ray Pozniak. He was a Penn State alum and a graphic  
6 designer. He lived and worked in State College.

7 Q. Do you know when he created this logo?

8 A. The late 1970s, '78, '79.

9 Q. And do you know anything about Mr. Pozniak personally as  
10 to why he might have created this design?

11 A. He was a very big fan. He was specifically a very big  
12 fan of the wrestling club, and he felt that the athletics  
13 department needed a good logo for the uniforms. And so he  
14 designed it.

15 Q. And was this symbol used by Penn State in the late 70s  
16 and 80s?

17 A. Mostly on intercollegiate athletic uniforms.

18 Q. And so was it the primary athletics brand during that  
19 time period?

20 A. Yes.

21 Q. During that time period, whether the University sold  
22 other apparel, like t-shirts or hats with the Pozniak lion  
23 design?

24 MR. HARMS: Objection. Foundation.

25 MS. WHEATLEY: Should I respond, Your Honor?

1 BY MS. WHEATLEY:

2 Q. Ms. Esposito, were you at the University in the 1980s?

3 A. I started in 1985. I'm sorry. October of '86. We have  
4 documents in the archives that go beyond -- before that.

5 MR. HARMS: Best evidence rule, Your Honor.

6 THE COURT: No. The objection's noted. It's  
7 overruled. The Court accepts the answer. You may continue.

8 MS. WHEATLEY: Thank you.

9 BY MS. WHEATLEY:

10 Q. Stepping back a bit, you mentioned that Ray Pozniak  
11 created the logo, and that he was a fan. How was the  
12 University able to use the logo that he created?

13 A. He gave them permission while he was alive. And then  
14 when he died, his son, Steven, who was his executor,  
15 transferred the rights to the University.

16 Q. And I'd like to look at a document concerning that. Can  
17 we pull up Plaintiff's Exhibit 407, which has been admitted.

18 Ms. Esposito, hopefully this is in your binder?

19 A. Um-hum.

20 Q. It might be easier to read there. It's sort of small on  
21 the screen. But I'll give you a second to turn to that.

22 A. Thank you.

23 Q. Ms. Esposito, can you explain to the jury what this  
24 document is?

25 A. It's an intellectual property purchase agreement. It's a

1 purchase agreement between Steven Pozniak and Penn State  
2 University for the Pozniak lion.

3 Q. And on the first seven-page, scrolling down a bit, the  
4 paragraph labeled Section 101. Do you see the definition for  
5 purchased assets in this paragraph?

6 A. Purchased assets means all intellectual property or other  
7 proprietary rights in associated with, or related to the  
8 Pozniak mark, including but not limited to the Pozniak  
9 registration, which is listed on schedule A. All common law  
10 rights in the Pozniak mark, any work protected by copyright  
11 that consists of or features the Pozniak mark and all  
12 derivative works thereof, the domain name, cat on the hat dot  
13 com, and all content published at such web address, the  
14 domain, all of the forgoing, together with the goodwill of the  
15 business in connection with the Pozniak mark has been used,  
16 and all licenses of the Pozniak mark to third parties are set  
17 forth in Exhibit B.

18 Q. All right. And I'd like to turn to schedule A. That's  
19 mentioned here among the purchased assets.

20 Based on Schedule A, what was Penn State purchasing  
21 from Ray Pozniak's son?

22 A. The Pozniak lion so they could use it on clothing.

23 Q. Thank you. And I'd also like to go to Exhibit B of this  
24 agreement, which is on page 11. Are you able to see that on  
25 your screen?



1 A. Yes.

2 Q. Now, based on this, you had mentioned that Ray Pozniak  
3 had an affection for, I think, wrestling?

4 A. Um-hum.

5 Q. What groups were specifically included in this agreement  
6 to have rights to use the Pozniak Lion?

7 A. The Penn State Alumni Association, the Lion Ambassadors,  
8 which is a student group within the Alumni Association, and  
9 the Nittany Lion Wrestling Club.

10 Q. Thank you. Now I'd like to turn to yet another Penn  
11 State mark, the S Lion logo.

12 Do you recognize this logo?

13 A. Yes, I do.

14 Q. Is this a design that Penn State has used on merchandise?

15 A. Yes, it is.

16 Q. I'd like to start by talking about the block S that's in  
17 the background of the logo. Is this -- is this something Penn  
18 State has used as a symbol?

19 A. Penn State has used the block S for -- since about the  
20 1880s. The Penn State name, the college has had its name  
21 changed four times. In 1855, when it was founded, it was  
22 founded as the Farmer's High School. That name was changed in  
23 1862 to the Agricultural College of Pennsylvania. When the  
24 Land Grant Act and the Morrill Land Grant Act were both signed,  
25 Penn State was designated by the legislature of the

1 Commonwealth as the Pennsylvania State College, because it  
2 would be the State College that would get the funds from the  
3 Land Grant Act. At that point in time, 1874, the S -- the  
4 block S started being used as a symbol for Penn State. It was  
5 done that way specifically to distinguish it from the  
6 University of Pennsylvania, which used a block P. The  
7 University of Pennsylvania, which is traditionally an ivy  
8 league college, did not want to be associated with the State  
9 College because the students at the State College were not the  
10 caliber that the students at the University of Pennsylvania.  
11 So there was a distinguishment made between the two. And the  
12 name was changed for a fourth time in 1953 to the Pennsylvania  
13 State University.

14 Q. Thank you. I'd like to look at another exhibit.  
15 Actually, we will just use this one as a demonstrative,  
16 Plaintiff's 231.

17 MR. HARMS: That's fine. No objection.

18 BY MS. WHEATLEY:

19 Q. Ms. Esposito, can you tell me -- who is pictured in that  
20 picture the jury sees on their screen?

21 A. This is Joe Mason. He is the third baseman that made the  
22 initial boast about the Nittany Lion. He graduated with a  
23 degree in mining engineering from Penn State and went to work  
24 in the Pittsburgh area and in Kansas on specifically potash.  
25 He actually has inventions on potash. He's wearing a letter

1 sweater he would have gotten from playing on the baseball  
2 team. He lettered in baseball for four years, and the  
3 lettermen would get those sweaters at the end of each year  
4 when they were designated as lettermen.

5 Q. And so is this an example of how that block S was used  
6 historically at Penn State?

7 A. Yes.

8 Q. And now switching back to the S lion logo. Do you  
9 recognize the lion that is shown here?

10 A. It's an African lion that was used initially when people  
11 thought about the Nittany Lion, even though there was never  
12 any African lions native to Pennsylvania.

13 Q. And so about when did Penn State switch to the -- to the  
14 mountain lion?

15 A. They switched to the mountain Lion in 1938/39, when they  
16 changed both the mascot suit, as well as the lions that they  
17 were using on material -- on publications and stuff. They had  
18 continued to use the mountain lion when they do retro days or  
19 go back days. They do the same thing with the school colors  
20 because the school colors were originally pink and black. We  
21 would have been the pink and black mules under coalie or the  
22 pink and black bull dogs before the lion. But the school  
23 colors were changed to blue and white. And so when they do  
24 retro merchandising, they tend to use pink and black and the  
25 African Lion as opposed to the cougar.

1 Q. And so does Penn State continue to use this S lion on  
2 that retro style merchandise?

3 A. Yes.

4 Q. Now I'd like to ask you about the trademark Penn State.  
5 When did the school's nickname become Penn State?

6 A. As I mentioned, the name was changed in 1874 to the  
7 Pennsylvania State College. Almost immediately, it was known  
8 as Penn State. It's similar to the University of Pittsburgh  
9 is known as Pitt, and the University of Pennsylvania is known  
10 as Penn.

11 Almost immediately, it was known as Penn State.  
12 And it was very much to distinguish it as the college where,  
13 as the -- as the Land Grant Act requires, was open to the  
14 citizens of the Commonwealth of Pennsylvania for all their  
15 children.

16 Q. And from your review of the University records, has the  
17 school been consistently referred to as Penn State since the  
18 1800s?

19 A. In everything that I've seen, in documents, and in  
20 talking with alums and in talking with, you know, people who  
21 worked at the University, it was always known as Penn State.

22 On official documents, it's either the Pennsylvania  
23 State College or the Pennsylvania State University, but in  
24 nomenclature it's Penn State.

25 Q. And, Ms. Esposito, over the years when you -- have you

1 introduced yourself to people who don't know you as working  
2 for Penn State?

3 A. I have.

4 Q. Has anyone ever asked you what Penn State was?

5 A. No.

6 Q. And are you aware, starting from when you joined the  
7 University in 1986, has the University consistently sold  
8 merchandise with Penn State on it?

9 A. Yes.

10 Q. And when -- starting when you were at the University in  
11 the -- in the late 1980s, did the University license the right  
12 to use Penn State on apparel and merchandise?

13 A. The University had a licensing committee that was  
14 established in 1982 that would look at what items venders  
15 wanted to sell and approve those items based on the vendor  
16 proposals.

17 Q. And you mentioned that the University's official name is  
18 the Pennsylvania State University. When did that become the  
19 University's official name?

20 A. 1953. It was changed specifically to reflect the amount  
21 of research that was being done at the University. There's a  
22 higher education rule about who gets to use the word college  
23 and who gets to use the word university. And it has to do  
24 with your research relationship.

25 Q. And from -- in your tenure at the University from 1986 to

1 2021, was merchandise with the Pennsylvania State University  
2 on it consistently sold?

3 A. Yes.

4 Q. Shifting gears again, I'd like to get to the University  
5 seal, if we can put that up on the screen.

6 Ms. Esposito, are you familiar with this trademark?

7 A. Yes. It's the University seal. It appears on -- the  
8 actual seal is on diplomas and on official documents. This is  
9 a replica.

10 Q. And when was that first adopted?

11 A. The seal itself was first adopted back when it was the  
12 Pennsylvania State College. It was changed to the  
13 Pennsylvania State University in 1953. The seal for the  
14 Agricultural College of Pennsylvania was very similar to this.

15 Q. And what is the significance of the 1855 on the seal?

16 A. That's the founding date of the university.

17 Q. And why was the University seal shaped like this with the  
18 scalloped edge?

19 A. Back in the days, when you did seals, they were literally  
20 -- it was literally a piece of equipment that went on wax, and  
21 you would push down on the wax, and the wax would scallop like  
22 that. This replicates the scalloping of a wax seal. The wax  
23 seal goes back to ancient Roman and Greek times. The most  
24 famous one is like on the Magna Carta or the Declaration of  
25 Independence. It works that way. The seal is very

1 specifically used for important documents like diplomas or  
2 deeds to peoples' houses.

3 It's also of significant importance in terms of  
4 recognizing the validity of an institution.

5 Q. And during your time at Penn State, does your research  
6 ever touch upon colleges or universities, other than Penn  
7 State?

8 A. Always. We were always looking at what other colleges  
9 were doing, specifically colleges that were considered our  
10 comparison colleges, like Big Ten colleges. But we always  
11 looked at what other colleges were doing in terms of what was  
12 the best practices. And almost every college has a seal.

13 As a matter of fact, in order for you, as an  
14 international student to come to Penn State, you have to show  
15 your diploma with the official seal on it in order for you to  
16 be accepted as an international student at Penn State.

17 Q. Thank you.

18 And now switching gears again, has the University  
19 historically created its own designs and logos?

20 A. It created its own designs and logos back in the early  
21 days and did so with its own print shop for decades up until,  
22 you know, cooperate agreements, you know, got other companies  
23 involved.

24 Q. Do you know -- do you have an idea of how far back the  
25 printing shop dated?

1 A. The printing shop goes back to the 1890s, and it works  
2 specifically with university office to print up things like  
3 class schedules and the course catalogs, as well as to print  
4 up things like sporting event tickets. It still exists.

5 Q. And for tickets, how did the process exist to print  
6 tickets to sell to students historically?

7 A. If you were printing tickets back in the day, you would  
8 use a printing plate. And the printing plate would -- would  
9 print out blocks of blank tickets at the beginning of the  
10 season. And then as the season went on, you would put in the  
11 names of the opposing teams and their logos. You would put  
12 the dates and you would put the seat markers.

13 And the reason you put the seat markers is so you  
14 would have blocks. So you would have the away team have their  
15 block of seats similar to the way we do, you know, whiteouts  
16 now where there's blocks of seats. But the tickets were  
17 literally sold in chunks that were called blocks.

18 Q. I'd like to look at an example. I believe Mr. Feters  
19 showed this in his opening when he was talking about  
20 memorabilia. Can we put Defendant's Exhibit 126 up on the  
21 screen.

22 What is the date on this ticket, if we look at the  
23 upper right?

24 A. It's November 9th, 1929.

25 Q. Based on this, who created this ticket?



1 A. This would have been created by the University of  
2 Pennsylvania, because this is an away game. They're playing  
3 at Franklin Field. And so they would have created the blocks  
4 within the dotted lines. And Penn State would have added the  
5 Keystone versus, with the Lion. And they would have had the  
6 seat numbers and the stands and all of that would have been  
7 printed and sent to Penn State. Penn State would then add  
8 their part to it and distribute it to their students and  
9 alums.

10 Q. And by their part, are you referring to the upper part  
11 with the Lion?

12 A. Where it says Penn State versus, with the Lion and the  
13 football with the keystone.

14 Q. So would that be at the University print shop?

15 A. It would have been at the University print shop, yes.

16 Q. And would those have been sold to students?

17 A. They would have been sold to Penn State students and  
18 alumni to go to the Franklin Field. And they would all sit in  
19 the same section, you know, at Franklin Field.

20 Q. And the design behind the Lion, what is the significance  
21 of that shape?

22 A. The keystone is significant to the history of  
23 Pennsylvania. Penn State -- the keystone, in Pennsylvania,  
24 was -- Pennsylvania is considered the keystone state during  
25 the American Revolution because it connected the northern

1 states with the southern states. So the keystone has been a  
2 symbol in the Commonwealth of Pennsylvania since the 1770s.  
3 Penn State used it because it was the Pennsylvania State  
4 College and designated by the Commonwealth as such.

5 Q. Okay. And I'd like to introduce a second exhibit, a  
6 similar one, I believe, was in Mr. Fetter's opening. It's  
7 Defendant's Exhibit No. 185. This is actually -- an actual  
8 ticket. May I approach?

9 THE COURT: You may.

10 BY MS. WHEATLEY:

11 Q. Ms. Esposito, what era is this ticket, and if we can  
12 show, maybe the -- there we go -- on the screen, so the jury  
13 can see it a little bit. What era is this ticket from?

14 A. It's November 25th, 1978. The parts of the ticket that  
15 are not typed would have been the block of ticket that was  
16 used until they had the game, the opponent in the game. In  
17 this case, the block part where it's typed was actually one  
18 the earliest uses of computers on campus where they would  
19 actually print these out and sell them.

20 So anything that you see that's -- looks like it's  
21 typed, actually was computer printed.

22 Q. And who would have applied the Nittany Lion logo to this  
23 ticket?

24 A. The ticket office would have asked the printing shop to  
25 make these tickets.

1 Q. Thank you. And we can put that one away. And actually  
2 I'll get it back. May I approach?

3 THE COURT: You may.

4 BY MS. WHEATLEY:

5 Q. Now, you mentioned working with the licensing committee,  
6 so this may be a foregone conclusion. But in your time at  
7 Penn State, did you ever have any responsibilities related to  
8 the University's trademarks?

9 A. I served on the licensing committee for about 10 years.  
10 From 1989 to about 1999, at which point the licensing  
11 committee changed because of our relationship with CLC.

12 Q. And can you explain what the licensing committee did?

13 A. The licensing committee was a committee established by  
14 the president of the university to review requests by vendors  
15 to use the University name and symbols on merchandise. And  
16 they would review the items -- initially we actually reviewed  
17 the physical items. When that became too big of a job, we  
18 started using photographs.

19 Q. And I'd like to introduce a document regarding the start  
20 of that committee, Plaintiff's Exhibit 22.

21 MR. HARMS: Objection, Your Honor. Unauthenticated  
22 hearsay and 403.

23 MS. WHEATLEY: Your Honor, 901.8, this qualifies as  
24 an ancient record. 803.16, this is also a statement in  
25 ancient document, so it's not hearsay.

1 MR. HARMS: It's unsigned, so it would not qualify  
2 as an ancient document because there's no a sufficient  
3 guarantee of trustworthiness, and it still is objectionable  
4 under FRE 403, contains legal conclusions, legal argument,  
5 etc.

6 MS. WHEATLEY: Your Honor, I believe Ms. Esposito  
7 can authenticate where the record was maintained, and it does  
8 not contain legal argument. It provides the historical  
9 origins of Penn State's licensing of its marks and evidences  
10 Penn States protections of its marks since that time.

11 THE COURT: Objection's noted. Overruled. Go  
12 ahead.

13 BY MS. WHEATLEY:

14 Q. Now, looking at Exhibit P-22, Ms. Esposito. Do you  
15 recognize this document?

16 A. It's a memorandum from Dr. John W. Oswald, who was  
17 president of the university from 1970 to 1983. It's dated  
18 August 5th, 1982. And it talks about establishing the  
19 licensing committee.

20 Q. Okay. And is this document located in the University  
21 archives?

22 A. Yes, it is. It's part of the president's papers.

23 MS. WHEATLEY: I'd like to move this in to  
24 evidence.

25 MR. HARMS: Same objections.

1 THE COURT: Objection noted. Overruled. Duly  
2 admitted. Do you wish to publish this, Ms. Wheatley or --

3 MS. WHEATLEY: Yes, I do.

4 THE COURT: You may publish to the jury.

5 BY MS. WHEATLEY:

6 Q. Ms. Esposito, can you explain to the jury what was going  
7 on that caused this memorandum to be written?

8 A. In the late 1970s, there was a lot of -- there was a big  
9 push to have individualized t-shirts, usually it came out of  
10 bands who wanted t-shirts. It kind of changed the culture of  
11 what students would wear to school, and so there were many  
12 requests to Penn State to start using Penn State materials.  
13 It was also the same time that the football team was becoming  
14 very successful and the football team was going to numerous  
15 championships and so it was a conflux of a change of fashion  
16 as well as a change of the school's notoriety in athletics.

17 Q. And based on this -- this demand and this concern, did  
18 the University take any steps to protect its trademarks?

19 A. The University did two things. They did a review to see  
20 how many requests had been made prior to this date. And they  
21 had a number of requests that had been made. And so they  
22 determined that there needed to be an effort made to protect  
23 -- to protect the trademarks, as well as to have a committee  
24 review the requests.

25 Q. And looking -- if we could flip to page eight of the

1 memorandum. I'd like to look at some of the -- what marks  
2 they were interested in.

3 Do you see the section title names and marks to be  
4 registered?

5 A. The University name, together with Penn State, PSU,  
6 Nittany Lion, and the University seal would be registered as  
7 trademarks with respect to appropriate categories of use.

8 Q. And so we know what Penn State is, the university's name,  
9 is that the Pennsylvania State University?

10 A. State University.

11 Q. And university seal. What was that referring to?

12 A. It would have been the seal that we looked at just a few  
13 minutes ago.

14 Q. And so these symbols were among the very first trademarks  
15 the University sought to protect; is that fair to say?

16 A. Yes, yes, they were.

17 Q. And I'd like to go back to page one and looking at the  
18 history section. I think you mentioned they had cataloged the  
19 request. Is that what you were referring to?

20 A. Yeah. The office of the senior vice president for  
21 financing had cataloged 93 requests beginning in the year of  
22 1973 of intention to use its name and other identifying works  
23 in connection with commercial goods and services. There is a  
24 summary attached to this memorandum. And they included  
25 wearing apparel and alcoholic beverages, bicycle bags and

1 other things. And the response to this requests was varied  
2 depending on the nature of the intended uses. The licensing  
3 committee continued to have a standard of quality it would  
4 enforce in the period of time I was on the committee.

5 Q. And the corporate seal that's being referred to here,  
6 request to use, do you know what that's referring to?

7 A. It's the seal that we looked at earlier.

8 Q. And the Nittany Lion, do you know what that refers to?

9 A. It usually refers to the Nittany Lion shrine. It can  
10 also refer to the mascot. It depends on what use it's being  
11 put to.

12 Q. So I'd like to look at an official record from this time  
13 period or shortly after, after you've gotten to the University  
14 related to how the university maintained its trademarks. We  
15 would like to introduce Plaintiff's Exhibit 363.

16 MR. HARMS: No objection.

17 BY MS. WHEATLEY:

18 Q. If we could zoom in on the top half so Ms. Esposito can  
19 see that.

20 Ms. Esposito, do you recognize this document?

21 A. It's a document from the United States patent and  
22 trademark office registering the trademark -- the Penn State  
23 university seal on May 8th, 1984.

24 Q. And do you see the section titled declaration. Who is  
25 David Branagan?

1 A. He was the assistant treasurer at the time. He worked in  
2 the office of the senior vice president for finance.

3 Q. Okay. And if you and -- was this declaration made under  
4 penalty of perjury?

5 A. Yes, it was.

6 Q. And if we could go to actually page three to see -- if we  
7 can zoom in on that. Did Mr. Brannigan sign this?

8 A. He signed and dated it April 24th, 1990.

9 Q. Okay. Did this declaration, do you know what the purpose  
10 of this declaration was?

11 A. It was to register the trademark for the mark for Penn  
12 State.

13 Q. Was there any effort made to show -- made to show that  
14 Penn State was using its trademarks?

15 A. Yes. You would always have examples. Whenever you  
16 submitted a trademark registration, you would have examples.

17 Q. Okay. If we could scroll through, I'd like you to tell  
18 me if you recognize the examples that were attached to this  
19 declaration?

20 A. There is key rings and a knife, and then the bottom one  
21 is stationary. Then you have some jewelry, you have note  
22 cards, a portfolio. The one on top is actually really  
23 significant because it's a chair. And while it looks like an  
24 ordinary chair, when you served at Penn State for 25 years,  
25 you get to choose what chair you will get from the University,



1 and it's either a Captain's chair or a rocking chair, and it  
2 has the seal on it. It's either in blue and white or it's in  
3 elms from the historic elms on campus. When the historic  
4 realms fall down, they take it down and make it in to  
5 products. And you get to choose after you've been there for  
6 25 years, which one of those chairs you would like to have as  
7 a gift from the university for your service. And so that's  
8 what these chairs are. They're very significant to employees  
9 because they have the seal.

10 Q. And do you recall that this was how the University was  
11 using the seal on merchandise and other items in 1990?

12 A. Yes.

13 Q. Now, I -- and is your work -- you were on the licensing  
14 committee in 1990, correct?

15 A. Yes.

16 Q. So would you review those types of products?

17 A. We would review. We would meet every -- initially we met  
18 quarterly. Then we had to meet every month. And we would  
19 review requests from venders for products. And we would  
20 review them for the type of product they wanted to produce,  
21 the type of quality of the product, how the symbols were being  
22 used, and how it was going to be marketed, because oftentimes  
23 they were marketed for short periods of time. And we would  
24 accept those that met the standard that had been set in the  
25 documentation we put forth for the venders. Venders always

1 had documentation as to what was expected of them. And if the  
2 venders didn't meet those expectations, their request was  
3 denied.

4 Q. And I'd like to look at a document related to the -- to  
5 the declaration we just looked at. Can we pull up Exhibit  
6 364. If we can zoom in on this. Is this another document  
7 from the patent and trademark office?

8 A. It is. It's from the patent and trademark office  
9 recognizing that the patent that Penn State had requested was  
10 approved.

11 Q. Thank you. I'm sorry. Trademark?

12 A. Yeah -- I'm sorry. It's from the patent office -- patent  
13 and trademark office. It's from the trademark statute. I'm  
14 sorry.

15 Q. No. Don't. Don't. It's been a long day.

16 A. This -- this is actually publicly available on the patent  
17 and trademark office website.

18 Q. Thank you. So the patent and trademark office accepted  
19 Penn State's examples of how it was using the trademark?

20 A. Yes, it does.

21 Q. And if you can look at the last line here, what did the  
22 patent and trademark office convey to Penn State?

23 A. Your request fulfills the statutory requirements and has  
24 been accepted.

25 Q. Thank you, Ms. Esposito.

1           And one more of these to look at. So that first  
2 one was related to the University's seal. Can we look at  
3 Exhibit 354.

4           MR. HARMS: No objection.

5 BY MS. WHEATLEY:

6 Q. Is this -- if we can zoom in to the top. Is this a  
7 similar sort of declaration to the trademark office?

8 A. It is. It's for the mark Penn State. And it was  
9 submitted December 11th, 1984 by the same David Brannigan.

10 Q. Actually scroll to the end. And I see the date there.  
11 When did he -- if you can scroll to the signature page.

12 A. It was submitted in April 24th, 1990.

13 Q. Was this was a renewal of the trademark?

14 A. Yes.

15 Q. And scrolling through the examples of use attached to  
16 this one. Can you let me know if you recognize these from  
17 your time at Penn State on the licensing committee?

18 A. Yeah. There are all kinds of memorabilia from cheering  
19 horns to the unfortunate stuffed Lion that you just showed.

20 Q. He looks a little bummed out.

21 A. He does look a little bummed out. I will say that there  
22 were items that the licensing committee turned down. There  
23 were two that come to my mind is particularly reasons that we  
24 had reasons to turn them down. We had at one point had a  
25 request to put the lady in the red shoes. She was posed by

1 the Nittany Lion, and all she had on was the red shoes. And  
2 that was supposed to be a -- put on t-shirts. We rejected  
3 that. We also rejected a Penn State coffin, which was blue  
4 and white and the -- blue on the outside, or white on the  
5 inside, and all of the -- the top of the coffin was Penn State  
6 symbols. We rejected that, as well. They were considered  
7 inappropriate.

8 Q. Understood.

9 And to your knowledge, was this declaration on the  
10 use of the trademark Penn State also accepted by the trademark  
11 office?

12 A. Yes, it was.

13 Q. When you were on the licensing committee, were potential  
14 licensees required to submit samples of their products?

15 A. Yeah. Initially they were asked to submit samples of  
16 their products, and we actually kept all the samples until it  
17 became a space consideration, at which point we went to asking  
18 for photographs and would only ask for samples if we had  
19 additional questions.

20 Q. And you mentioned quality restrictions on the merchandise  
21 that was -- that was given permission to use the Penn State  
22 trademarks. What sort of things would you look for the  
23 products?

24 A. The quality in the production of the product, the type of  
25 materials that were being used, was it being fairly sourced,

1 and also were the images appropriate to the message for the  
2 University.

3 Q. Do you recall why the University had rules in place about  
4 how the trademarks were being used?

5 A. Because the University wanted to protect what people  
6 believed were symbols of its heritage and its history. I mean  
7 some of these images go back hundreds of years for Penn State.  
8 And they're very tied to alums and fans in terms of how they  
9 think about Penn State.

10 Specifically, the seal. Just recently in a Penn  
11 State alumni magazine, there was an alum who was asking about  
12 the seal. And then the Nittany Lion shrine is absolutely  
13 affiliated with Penn State in peoples' minds.

14 Q. And in the time you were on the licensing committee, were  
15 there ever times where people sold Penn State merchandise  
16 without a license?

17 A. Yes, there were. We would -- we would -- the University  
18 would send a cease and desist letter. If the cease and desist  
19 letter wasn't sufficient to stop the sale, they would pursue  
20 legal action.

21 Q. And generally, was a cease and desist letter sufficient?

22 A. 95 percent of the time.

23 Q. And I believe you mentioned, has -- in your experience on  
24 the licensing committee, has the University generally, you  
25 know, used throw back or retro designs at times?

1 A. Um-hum. Yes. They used retro -- students like doing  
2 that. They like to use throw back designs, especially when it  
3 comes time for the anniversary. Because the university's  
4 anniversary is February 22nd, 1855. That's when the charter  
5 was signed. And so usually around that period of time, they  
6 will -- they will do throw back.

7 Q. And over the time you were at the University, did Penn  
8 State's number of companies who were permitted to use the Penn  
9 State trademarks grow?

10 A. Exponentially, especially once the football team got  
11 really popular and the football team was going to  
12 championships. And so by '82, '83, '86, when we were having  
13 the good years, it grew exponentially, then was part of the  
14 reason, once we joined the Big Ten, that we started working  
15 with CLC because the operation became sizemetically large for  
16 the six-person committee that was sitting reviewing these  
17 things.

18 Q. And when companies were granted permission to use a Penn  
19 State trademark on merchandise, did Penn State receive any  
20 sort of payment from those companies?

21 A. They usually received a royalty. The royalty was usually  
22 between 7 and 10 percent.

23 Q. Ms. Esposito, have you, yourself, ever bought Penn State  
24 clothing?

25 A. Yes. Multiple times in my 35 years of Penn State.

1 Q. I have to ask.

2 A. I know. I am -- when I'm doing public presentations, I  
3 usually will wear Penn State clothing. And several babies  
4 that have been born in the family has gotten Penn State  
5 clothing. Yes, I do buy Penn State clothing.

6 Q. And about how many pieces have you bought, would you say?

7 A. Hundreds. There's at least 20 in my closet right now  
8 that I swap out, depending on what I'm doing.

9 Q. If Penn State's mascot were still Coalie the mule, who  
10 you mentioned earlier, would it make a difference to you in  
11 wanting to buy Penn State clothing?

12 A. It depends on what the values are for Penn State. You  
13 know, for me, Penn State's values are its education and its  
14 research, and I work with a lot of students -- I've always  
15 worked with a lot of students who believe that value, believe  
16 what they're getting from Penn State, and so if we had gotten  
17 to a point where it was going to be the black and pink mule,  
18 and that was going to be what we were going to be, I think  
19 that works. I mean the University of Southern California in  
20 Santa Barbara has a banana sees low as their mascot, you know.  
21 I think that your loyalty is to your school, and Penn State  
22 students and alums are extremely loyal to what they believe  
23 the values of the school are, in my experience.

24 Q. And so when you purchase Penn State merchandise, does the  
25 University's reputation influence your purchase decision?

1 A. Yes.

2 Q. And do you recall some of the retailers who you've gotten  
3 merchandise from?

4 A. I usually buy all of my Penn State merchandise from the  
5 retailers downtown. I like to shop local. I'm not a big box  
6 store shopper normally. Occasionally I will go to Walmart.  
7 But normally, I prefer to go to the local stores downtown.

8 Q. And have you ever bought Penn State clothing knowing it  
9 wasn't sold or authorized by the University?

10 A. Not knowingly.

11 Q. And does it matter to you, as a consumer, whether the  
12 university approves of the Penn State clothing a merchandise?

13 A. Yes. But part of that is my experience at the University  
14 and my years at the University, but part of it has to do with  
15 the quality of the images.

16 MS. WHEATLEY: No further questions, Ms. Esposito.

17 THE COURT: Thank you.

18 Defense Counsel care to cross-examine?

19 MR. HARMS: Yes, Your Honor.

20 THE COURT: Go right ahead, sir.

21 CROSS EXAMINATION

22 BY MR. HARMS:

23 Q. Good afternoon. We haven't met before, have we?

24 A. Not that I know of.

25 Q. Not that I know of either.



1 A. I'm not good with faces, though.

2 Q. I'm Josh Harms. I'm one of the attorneys for the  
3 Defendants. I have a few questions for you today. This will  
4 be pretty quick.

5 Penn State developed a licensing program in 1983, I  
6 believe that's correct?

7 A. No. 1982, yes.

8 Q. 1982. Thank you. Is that also when the licensing  
9 committee began?

10 A. Yes. It was chartered by the president to take care of  
11 this issue that had become too big for the finance office to  
12 handle.

13 Q. Um-hum. And then you joined the licensing committee in  
14 1986, I believe, you testified to?

15 A. 1989.

16 Q. 1989?

17 A. My boss had been on it prior to that. The University  
18 archivist was asked to be on the committee, specifically to  
19 identify historical images.

20 Q. Understood. I believe you mentioned in your testimony  
21 that in 1989, the licensing committee retained CLC; is that  
22 correct?

23 A. The university retained CLC. It was part of the  
24 agreement that they made with the Big Ten. The Big Ten had  
25 already committed a contract with the CLC as part of the Big

1 Ten, we were encouraged to join that.

2 Q. And that was in 1989?

3 A. Yes.

4 Q. You mentioned that reviewing products became too big of a  
5 job for the licensing committee. Could you explain more what  
6 you meant by that?

7 A. That's the number of venders, the type of items. And  
8 sometimes the short turnaround.

9 Q. Um-hum.

10 A. You know, for example, right now, the licensing committee  
11 would be anticipating championship games and bowl games, and  
12 you have a real short turnaround on things like that. And  
13 when the committees's only meeting once a month, or, you know  
14 -- actually, this was meeting quarterly, we had to start going  
15 to once a month. And then we would have ad hoc meetings if we  
16 had to or short periods of time. So it was the number of  
17 venders, the number of requests they were getting. It was  
18 much more than a six-person committee could handle.

19 Q. And when did that start happening?

20 A. The late 90s, '96, '97

21 Q. Can you estimate about how many licensees for retail  
22 merchandise the University had at that point?

23 A. I could not, no. But it was -- it was in the thousands.

24 Q. It was in the thousands?

25 A. Yes.

1 Q. And you had received photographs --

2 A. Yes.

3 Q. -- of merchandise from --

4 A. And all those photographs are in the binders, in the  
5 records, under the licensing committee's record group.

6 Q. Understood. And that's what the licensing committee  
7 would review?

8 A. Yes.

9 Q. For product quality?

10 A. Yes. If we had questions, we would actually ask to see  
11 samples.

12 Q. Right. How often did you have questions?

13 A. Maybe one in four or five times. Maybe, you know, 10, 20  
14 percent of the time.

15 Q. 10 or 20 percent of the time?

16 A. Um-hum.

17 Q. You were asked?

18 A. To see actual samples. When we stopped collecting  
19 samples and we were looking at photos, when we would get  
20 samples, we would send them back to the vendor.

21 Q. Understood. During your testimony, you mentioned  
22 rejecting designs. I think you mentioned rejecting a coffin  
23 design?

24 A. Um-hum.

25 Q. So in those situations, you were rejecting a design,

1 rather than the physical item, correct?

2 A. It was both. It was both the physical item and the  
3 design.

4 Q. Okay?

5 A. It was deemed to be inappropriate at the time. Now I  
6 don't know if it has got tone -- you know, if -- since I no  
7 longer served on the licensing committee, they have since  
8 approved a Penn State could have fin.

9 But at the time, we were presented with it, we felt  
10 it was inappropriate.

11 Q. Understood. Just looking at how products appear in a  
12 photograph, that doesn't really tell you about the actual  
13 material though, does it?

14 A. No. The surrender had to provide specifications.

15 Q. Specifications. Can you please explain?

16 A. There were guidelines as to every surrender as to what  
17 they were to provide us so we could make decisions and there  
18 were specifics as to what kind of materials had to be used  
19 and, you know, the quality of the materials.

20 Q. But you couldn't assess those materials in person?

21 A. No. But if we had a question, we asked for a sample.

22 Q. Okay. What would trigger you to have a question about  
23 them?

24 A. Usually if the imprint on the shirt was blurry, or if the  
25 image did not look like it should look, you know, if -- if

1 there were misspellings, I know that sounds ridiculous, but  
2 we would get examples that misspellings on them. And, you  
3 know, then you contact the vendor and ask for things to be  
4 fixed.

5 Q. So that would be an issue with the design that was  
6 printed on the merchandise?

7 A. Yes.

8 Q. Okay. Is that also the quality -- that also affect the  
9 quality of the product, the tangible thing?

10 A. Not -- it wouldn't necessarily have to. I do not work in  
11 retail. I was there to review the validity of the request  
12 based on the images and on the use of the marks.

13 Q. Understood. Did the licensing committee focus on  
14 licensing designs for Penn State fan apparel and fan  
15 merchandise? Would that be a fair way to characterize it?

16 A. That's who the audience was. They were selling it to  
17 Penn State students, Penn State alums. I assume that those  
18 people are Penn State fans.

19 Q. Right. And this might be a silly question, but bear with  
20 me. Why was the target market for these items Penn State  
21 fans? Why wasn't it the public generally?

22 MS. WHEATLEY: Objection. Foundation.

23 MR. HARMS: I believe this is directly consistent  
24 with something she talked about during her direct.

25 THE COURT: I agree. Objection noted. Overruled.

1 Go ahead.

2 THE WITNESS: Could you repeat the question?

3 MR. HARMS: Yes.

4 BY MR. HARMS:

5 Q. Why would the Penn State fan merchandise and fan apparel  
6 be marketed directly to Penn State fans and Penn State  
7 supporters, rather than the public at large?

8 MS. WHEATLEY: I'll renew the objection, but I  
9 understand.

10 THE COURT: Objection noted. Overruled.

11 BY MR. HARMS:

12 Q. You may answer.

13 THE COURT: Go ahead, ma'am.

14 THE WITNESS: The audience for the apparel were for  
15 people who supported Penn State, Penn State students, Penn  
16 State alumni. They tend to be Penn State fans. I wouldn't  
17 imagine that the general public would buying Penn State stuff  
18 if they weren't Penn State fans. My -- you know, my brother  
19 lives in Brooklyn. And the Penn State material he has is  
20 stuff I've sent to him because his sister lives in State  
21 College, not because he's a Penn State fan necessarily, but  
22 because he's received it as a gift from somebody who is  
23 associated with Penn State.

24 BY MR. HARMS:

25 Q. You mentioned during your testimony a moment ago that

1 you, yourself, own fan apparel?

2 A. I do.

3 Q. And you testified, I believe, that you own it because of  
4 the reputation of Penn State?

5 A. Absolutely.

6 Q. Can you please explain more what you mean by reputation  
7 in that context?

8 A. I personally believe in the value of the education and  
9 the research that's done at Penn State. I personally believe  
10 that students from working class families should have a  
11 university to go to that first generation students should have  
12 a school that's theirs that they can go to that they can have  
13 loyalty to. I believe in those things that are part of the  
14 mission statement of Penn State. That's important to me. It  
15 was important to me when I was hired at Penn State. It's  
16 important to me as part of being an employee of Penn State,  
17 even though I'm retired from Penn State. That still means a  
18 great deal to me.

19 And when I purchase Penn State apparel to give as  
20 gifts, it's because I'm proud of the things that Penn State  
21 has done. Penn State is responsible for thousands of  
22 inventions and innovations, and I am really proud of that  
23 record of what Penn State has done since 1855.

24 Q. I appreciate that answer, Ms. Esposito.

25 Let's pull up Exhibit D-105. And we're not going

1 to publish this to the jury right now. And I apologize.

2 Actually, let's pull up P-22. Sorry about that.

3 Do you remember testify -- do you remember  
4 testifying about this a moment ago, Ms. Esposito?

5 A. Yes. From -- from Dr. John Oswald. It's in the  
6 president's papers in the University archives.

7 Q. Let's turn down to page 3 of this memo. And I want to  
8 look at this heading one. Advantages of protection of marks.  
9 I'm going to read 1 A. Enable the University to stop the  
10 unauthorized use by any person or company of the university's  
11 marks, names, or symbols. Did I read that correctly?

12 A. Yes.

13 Q. And there are a few sub points below 1 A that I'd like  
14 you to read to yourself. Please let me know when you've done  
15 that.

16 A. ( The witness complies. ) Okay.

17 Q. Does any of this mention consumer confusion, confusion  
18 about the source of products?

19 A. It's -- stops such use on goods or services for which it  
20 is not authorized by a license agreement. I don't know -- I  
21 don't understand what you're leading toward.

22 Q. Were you on the licensing committee when this memo was  
23 issued?

24 A. I was not. I was not even working at Penn State until  
25 1986. My boss was, and when he decided to step down from the



1 licensing committee, I was appointed to the licensing  
2 committee because we had -- the president's office felt there  
3 needed to be a representative from the University archives on  
4 the committee to protect the University's historical images.

5 Q. We talked a moment ago about -- we can take this exhibit  
6 down. We talked a moment ago about Collegiate Licensing  
7 Companies, CLC, and you testified that that relationship with  
8 the University began in 1989, I believe. Is that correct?

9 A. Yes.

10 Q. Let's pull up Exhibit D-105. This won't be published.  
11 And let's scroll down a little bit. Ms. Esposito, I'd like  
12 you to read this first full paragraph of this letter to  
13 yourself. And let me know when you've done that.

14 A. ( The witness complied. )

15 MS. WHEATLEY: I'll object to using this exhibit  
16 with this witness for lack of foundation, hearsay.

17 MR. HARMS: Have you finished reading the first  
18 paragraph of the letter, Ms. Esposito?

19 THE WITNESS: This is from Michigan State. This is  
20 not from Penn State.

21 THE COURT: Well, I think the question is have you  
22 finished reading the first paragraph?

23 THE WITNESS: I've read the first paragraph, yes.

24 THE COURT: Mr. Harms, ask your next question.

25 MR. HARMS: Thank you.

1 MS. WHEATLEY: I will renew the objection to asking  
2 the witness about a letter from Michigan State.

3 MR. HARMS: It's a letter on behalf of Penn State  
4 and Michigan State and all the other schools that CLC  
5 represents.

6 THE COURT: I'll let you explore this. The  
7 objection's overruled. Go ahead.

8 BY MR. HARMS:

9 Q. You see that the sentence that says on behalf of the  
10 colleges that we represent. Do you see that?

11 A. Yes.

12 Q. And if we scroll up to the top of the letter, we see this  
13 is from the Collegiate Licensing Company, and it's dated May  
14 3rd, 1991, correct?

15 A. Yes.

16 Q. And would the license -- the colleges that the Collegiate  
17 Licensing Company represents at that time include Penn State?

18 A. We just joined the Big Ten in 1991.

19 Q. And you've testified earlier that the relationship  
20 between Collegiate Licensing Company and Penn State began in  
21 1989, I believe?

22 A. We joined the Big Ten. Part of the Big Ten -- joining  
23 the Big Ten meant contracts with other corporations that were  
24 part of the Big Ten, and Collegiate Licensing was part of  
25 that. We joined the Big Ten in 1991. Most of the other

1 contracts were after 1991. Is that --

2 Q. I suppose the contract between the University and CLC  
3 specifically, not the contract between the University and  
4 other sub licensees.

5 I believe you had testified that was 1989?

6 A. That was my understanding, yes. If it was earlier, I  
7 apologize for my mistake.

8 MR. HARMS: Your Honor, I'd move to admit this  
9 Exhibit, D-105.

10 MS. WHEATLEY: Objection. Foundation. Relevance.

11 THE COURT: What is the relevance of this?

12 MR. HARMS: It goes --

13 THE COURT: Where are you going with this,  
14 Mr. Harms?

15 MR. HARMS: It goes on to describe the official  
16 label, if you look at the label marketing concept, under such  
17 matters that are going to be explored in this case, perhaps  
18 not with this witness for too long, but later in the case.

19 MS. WHEATLEY: Objection. Hearsay. This has not  
20 been authenticated in any way. It is not from anyone involved  
21 in this case.

22 MR. HARMS: It's a statement by a party agent. And  
23 there was no authenticity objection.

24 MS. WHEATLEY: We objected based on hearsay. And  
25 also, I don't think there's been any evidence that this was a

1 party agent, that this was on behalf of Penn State.

2 THE COURT: Is it a party agent? CLC?

3 MR. HARMS: And it says the colleges that we  
4 represent, and it's May of 1991.

5 MS. WHEATLEY: There has been no witness who has  
6 testified to any of the facts that Mr. Harms is asserting.  
7 This is not -- Ms. Esposito has not been able to authenticate  
8 this document. I don't see how this can come into evidence.

9 THE COURT: Yeah. I'm inclined to agree. I will  
10 disallow it. Objection sustained.

11 MR. HARMS: That is all right. We can move on.

12 BY MR. HARMS:

13 Q. Let's go to Exhibit D-28. This will be my last few  
14 questions for you, Ms. Esposito.

15 I don't believe this has been admitted yet. I  
16 don't think there is an objection, Ms. Wheatley?

17 MS. WHEATLEY: No.

18 THE COURT: What's the Exhibit Number?

19 MR. HARMS: D-28.

20 THE COURT: D-28?

21 MR. HARMS: Yes, Your Honor.

22 MS. WHEATLEY: No objection, provided Ms. Esposito  
23 is familiar with it.

24 THE COURT: Let's start there.

25 BY MR. HARMS:

1 Q. Ms. Esposito, have you seen this document before?

2 A. I've seen documents similar to this.

3 Q. You've seen documents similar to this, the Penn State  
4 brand book?

5 A. Yes.

6 MR. HARMS: I would move to admit it, Your Honor.

7 MS. WHEATLEY: I would object to asking  
8 Ms. Esposito about this document if she hasn't seen it. I  
9 have no objection to asking a witness who is familiar with it  
10 about it.

11 THE COURT: Do you want to lay more of a foundation  
12 with this witness, Mr. Harms, go ahead.

13 MR. HARMS: Yes, Your Honor.

14 BY MR. HARMS:

15 Q. How -- in what context have you seen this document  
16 before? Have you seen is it on Penn State's website?

17 A. I have seen versions of the visual identity standards as  
18 part of the licensing committee and as part of the  
19 documentation in the archives of how venders and users are  
20 expected to use symbols related to the University. I don't  
21 necessarily believe I've seen this one in particular. But  
22 there have been versions of this.

23 Q. And do you understand this to be a version of what you  
24 were just describing, a later version, perhaps?

25 A. Definitely a later version.

1 MR. HARMS: Your Honor, I would move to admit.

2 MS. WHEATLEY: Your Honor, if this was after  
3 Ms. Esposito's time at Penn State, I don't think it's fair to  
4 ask her to testify about it.

5 MR. HARMS: Your Honor, I would also note that  
6 there were no objections to this exhibit when it was  
7 identified.

8 THE COURT: They also didn't know which -- I think  
9 the witness was going to be explaining it.

10 What else -- what else do you have -- what else do  
11 you have in terms of this exhibit in regards to questions for  
12 this particular witness?

13 BY MR. HARMS:

14 Q. Ms. Esposito, earlier you talked about the athletics  
15 mark.

16 A. The Pozniak mark?

17 Q. The athletics mark. I believe it's the modern mark.  
18 It's a side profile of the Nittany Lion that's used for the  
19 Penn State athletics teams?

20 A. I talked about the Pozniak mark. I haven't talked about  
21 any other mark.

22 Q. Is there another mark that the Penn State teams use  
23 currently that's not the Pozniak Lion?

24 A. Penn State, just within the last two weeks, changed their  
25 marking. I don't know what specific mark you're talking

1 about.

2 Q. Have you heard of the chipmunk mark?

3 A. I have, yes. I've heard that derogatory name use.

4 Q. And I apologize. I don't mean to use it in a derogatory  
5 --

6 A. No. You're not the only one. It was widely referred to  
7 as the chipmunk mark. Yes, I am familiar with the chipmunk.

8 Q. And would you please describe that?

9 A. It's a lion face with puffed cheeks. And that's why it  
10 was referred to as the chipmunk, because of the puffed cheeks.

11 Q. And that's considered to be the Penn State athletic  
12 trademark, correct?

13 A. It was used by Penn State athletics for a number of  
14 years. I don't know that it's still used by Penn State  
15 athletics.

16 Q. During that period of use, was it designated as the  
17 athletic trademark?

18 A. Not -- I don't know if that was its sole designation.

19 Q. Okay. What about the Lion and shield design, I'll call  
20 it. Are you familiar with that logo?

21 A. A Lion's face in the shield?

22 Q. Yes.

23 A. For Penn State or -- I mean specifically for Penn State?

24 Q. Yes. Yes. For Penn State, Are you aware of Penn State  
25 having a logo that it uses that is a Lion in a shield?

1 A. I've seen lots of images in publications at Penn State,  
2 starting in the 1880s when the first yearbook was published.  
3 There have been many versions of lions, lions and shields,  
4 lions and keystones. You'd have to be a whole lot more  
5 specific.

6 Q. This would be the modern academic trademark that Penn  
7 State uses, the Lion in the shield.

8 A. I would need to see it. I'm sorry.

9 MR. HARMS: No further questions, Your Honor.

10 THE COURT: Thank you. Any redirect?

11 MS. WHEATLEY: Just briefly.

12 REDIRECT EXAMINATION

13 BY MS. WHEATLEY:

14 Q. Ms. Esposito, when you reviewed products as part of the  
15 licensing committee at Penn State, did you take your job  
16 seriously?

17 A. I took every day of my job seriously. I was responsible  
18 for the University documents. I was responsible for the  
19 University's history. I'm the person who was asked to speak  
20 for those documents and to protect those documents, and to  
21 make them accessible -- as accessible as possible. I took my  
22 job extraordinarily seriously.

23 Q. And did you take the quality of Penn State's products  
24 that had Penn State symbols on them seriously?

25 A. Absolutely. It was very important to me, and what people



1 were seeing represented Penn State. It's still very important  
2 to me. When I do presentations, when I do workshops, I always  
3 talk about the integrity and the value of Penn State and what  
4 it has done in 165 years. It has not been perfect, every one  
5 of those 165 years. But it has done a whole lot for the  
6 Commonwealth that it can be very proud of. And when people  
7 look at the Penn State name and logos, that's what most alums  
8 that I've met in my lifetime see when they see that image.

9 MS. WHEATLEY: Thank you very much, Ms. Esposito.  
10 No further questions.

11 THE COURT: Any recross examination?

12 MR. HARMS: No, Your Honor.

13 THE COURT: Ms. Esposito, thank you very much for  
14 your testimony. You may stand down with the thanks of the  
15 Court. Unless you have a very short witness, I think this is  
16 a good time to recess, Mr. Finkelson?

17 MR. FINKELSON: Agree, Your Honor. I think our  
18 witness will be too long for that, and it's been a long day  
19 for everyone.

20 THE COURT: Indeed.

21 Ladies and gentlemen, you've heard the first day of  
22 testimony. Again, please don't discuss this case amongst  
23 yourselves or with anyone else, other than if you return home  
24 tonight to tell people that you are associated with that you  
25 have been called to jury duty. You're serving as a juror in a

1 federal case, and you can tell them generally what the case is  
2 about. That's it.

3 I'll have you back tomorrow ideally by about 9:15.  
4 You're going to assemble in the jury assembly room by room on  
5 the second floor as you did this morning. And by 9:30, you  
6 should be up in the jury room and we'll be ready to begin  
7 testimony for tomorrow. So Court will stand in recess then  
8 until 9:30 a.m. Wednesday, November 13. If you want to escort  
9 the jury out, please.

10 (At 4:56 p.m., the jury left the courtroom and were  
11 excused for the day.)

12 THE COURT: So, Ms. Wheatley, Mr. Finkelson, where  
13 are we going to go tomorrow?

14 MS. WHEATLEY: I believe we will hear from  
15 Ms. Petulla and Mr. Howell. We may play some --

16 THE COURT: I'm sorry. Say it again?

17 MS. WHEATLEY: Ms. Petulla, Mr. Howell. And we may  
18 play some of our designated depositions.

19 THE COURT: What about Ms. Gummo?

20 MR. FINKELSON: I don't think, Your Honor, we will  
21 get to Ms. Gummo tomorrow. If we have Mr. Howell, Ms.  
22 Petulla and the depositions. I think it will be likely that  
23 Ms. Gummo will be pushed to the following day.

24 THE COURT: So how long is Ms. Petulla's testimony?

25 MR. FINKELSON: Quite long. Mr. Howell is

1 considerably shorter.

2 THE COURT: When you say quite long, how many --  
3 Ms. Wheatley?

4 MS. WHEATLEY: I think it could easily take three,  
5 three-and-a-half hours just because of the establishing use  
6 and that evidence.

7 THE COURT: So it will take the morning in to the  
8 afternoon?

9 MS. WHEATLEY: I think quite possibly.

10 THE COURT: What sort of cross examination do you  
11 have for Ms. Petulla? Who is going to examine?

12 MR. FETTERS: I will be cross-examining. But I  
13 imagine it will be much shorter. An hour, at most.

14 THE COURT: You really think it will be that long?  
15 Why would it be that long?

16 MS. WHEATLEY: She goes through the trademark  
17 registrations and the evidence of use. And she goes through  
18 the University's quality control. I think some of that was  
19 taken care of today.

20 THE COURT: This -- well that's what I'm wondering.  
21 Do the best that you can. And Mr. Howell, what is -- he's  
22 from CLC.

23 MR. FINKELSON: He's from CLC. I suspect that  
24 Mr. Howell, on direct, will be less than an hour.

25 THE COURT: Who is going to cross-examine?

1 MR. HARMS: Me, Your Honor. And the cross will not  
2 be very long.

3 THE COURT: And you want to play some depositions.

4 MR. FINKELSON: They are, Your Honor. We've  
5 significantly reduced the deposition lengths. So we exchanged  
6 new designations with the other side over the weekend. We're  
7 under two hours in on all of the depositions that we're  
8 playing in our case in chief. So I think it's an hour and --

9 THE COURT: So who are we hearing from tomorrow.

10 MR. FINKELSON: So tomorrow you're going to hear--  
11 we'll decide on the offered this evening. But tomorrow you  
12 will hear from both Ms. Petulla and Mr. Howell, and then you  
13 will most likely hear video testimony.

14 THE COURT: Video.

15 MR. FINKELSON: If we can get Ms. Gummo on, we will  
16 certainly try. That's the next in the row for us. That will  
17 leave two witnesses for us.

18 THE COURT: But who am I hearing by way of video  
19 deposition tomorrow?

20 MR. FINKELSON: Oh. It is -- it is -- we have  
21 four. One is Erik Hartvigson, one is Chad Hartvigson, one is  
22 Michelle Young, and the other is Ms. Matthew, who was  
23 referred to today. Those are the four that we are intend to  
24 go play tomorrow, depending on time, and then there's one  
25 other deponent that we're still making decisions on Mr.

1 Delong.

2 THE COURT: And then you might get to Ms. Gummo is  
3 what you're telling me.

4 MR. FINKELSON: We may get to Ms. Gummo. We're  
5 certainly going to try. Certainly if the cross examinations  
6 are relatively short, we would get to Ms. Gummo and we'll  
7 disclose her to the other side tonight, that's she'll be a  
8 witness tomorrow. And then that will leave Mr. Franklyn

9 THE COURT: And if you don't put Ms. Gummo on  
10 tomorrow, she would role in to Thursday, the 14th.

11 MR. FINKELSON: She would, Your Honor. And then no  
12 assurances as to the order as between Mr. McGrath and Mr.  
13 Franklyn. Those would be our two final witnesses. I think  
14 Mr. McGrath would be relatively short. It's our current  
15 expectation, Your Honor, that, you know, we'll rest our case  
16 either end of day Thursday, probably more likely sometime  
17 early on Friday. But -- but resting on Thursday is not out of  
18 the question if we continue to move at the pace we're moving

19 THE COURT: Very good. What -- may I ask. And I  
20 appreciate this. You've listed a Sunbury of the -- I want to  
21 describe sort of as the business records custodians for CLC.  
22 Internet archives, an individual from San Francisco, a Mr.  
23 Franklyn white, who is an Internet archivist, I guess, Garnett  
24 Lee for authentication purposes? Is there going to be a need  
25 to that or have you come to stipulations on this?

1 MR. FINKELSON: I think we've come to an agreement  
2 on most of the exhibits that would have come with that. And  
3 then Your Honor has dealt. I think we have one potential  
4 authentication witness. We have a sweatshirt that are as the  
5 Pozniak lion on it. And based on the meet and confer last  
6 night, my understanding is that the Defendants are insist  
7 {thaing} we put on a authenticating witness. That  
8 authenticating witness would be our client, Mr. Blue won,  
9 whose sweatshirt it is. That seems un{snes}, but if the other  
10 side wants us to do that, we can put Mr. {pwul} {la} {pwon} on  
11 the stand to do, that's and we would probably do that tomorrow  
12 if we can't reach an agreement to avoid that tonight.

13 THE COURT: All right. Well do what {uz} can with  
14 that.

15 All right. Very good.

16 So with that -- Thank you, Counsel.

17 So with that in mind, so the Defense has to assume  
18 that you may very well commence your case Friday. So you're  
19 going to have your witnesses around for that purpose? No  
20 reason to think it's any earlier than that, I think, once the  
21 path has been chartered here. I'm looking at you, Mr.  
22 Fetters, but I mean to everyone.

23 MR. FETTERS: We would be ready to commence Friday.  
24 Once the Plaintiff rests

25 THE COURT: All right. So we'll stand in recess

1 until tomorrow, which is Wednesday, November 13, 9:30 a.m..

2 Court will rise.

3 (At 5:03 p.m. the proceedings were concluded.)

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